No. 79-216

In the Supreme Court of the United States

OCTOBER TERM, 1978

PETER V. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner Peter V. Pappas and Petitioner Robert Craig, Defendants-Appellants in the Court below, respectfully pray that a Writ of Certiorari issue, to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The Opinion of the three-judge *en banc* panel of the Seventh Circuit has not yet been officially reported. It is set forth in the Appendix. (Appendix A, pp. 1-6).

Also included in the Appendix, is the brief Minute Order of the district court denying the Rule 33 Motion for New Trial. (Appendix B, p. 7).

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was filed on July 11th, 1979. (Appendix A).

A Motion suggesting Rehearing *En Banc* was not presented.

This Petition is filed within the 30 day period required by the Rules of this Court.

The Jurisdiction of the Supreme Court is invoked under Title 18, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The Questions posed here for Review, all revolve about and are founded upon:

* Prosecutorial suppression of evidence before and during the trial.
* Prosecutorial failure to comply with defense discovery demands and court-ordered disclosures.
* Prosecutorial confession of such suppression.
* Prosecutorial concession that the suppressed documents were "newly-discovered" by the defense after the trial.

Thus, each Question is posed without repeating in each instance, the foregoing factors:

1. Whether the denials below of the defense Motion for New Trial, where the suppressed evidence was material, conflicts with *United States* v. *Agurs*, 427 U.S. 110 (1976).

2. Whether the courts below thereby sanctioned prosecutorial suppression of evidence in violation of the Government's obligations under *Brady* v. *Maryland*, 373 U.S. 1 (1963).

3. Whether the courts below further thereby sanctioned prosecutorial suppression of evidence in violation of the Government's obligations under the *Jencks Act*, 18 USC 3500 et seq.

4. Whether the prosecutorial suppression of evidence deprived the defense of a fair trial and violated due process, and was in conflict with applicable decisions of this Court.

5. Whether the prosecutorial suppression of evidence deprived the defense of their Sixth Amendment rights of confrontation and was in conflict with applicable decisions of this Court.

6. Whether the judicial affirmance below of this prosecutorial suppression of evidence departs from the usual standards of judicial proceedings as to now invoke the supervisory powers of this Court.

7. Whether as a matter of federal law, this Court should not extend its *Caceres* limitation upon the Exclusionary Rule and thus apply the Rule to suppress tapes where there was noncompliance by a United States Attorney with the Attorney General's Guidelines requiring advance written authority to tape conversations and where the tapes were not secured.

8. Whether the judicial sanction of the prosecutorial suppression of evidence which affected adversely the authenticity of tapes of consensual conversations, violates prohibitions against unreasonable searches and seizures and is contrary to decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved here and relied upon by the Petitioners, read as follows:

I. The Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . ."

II. The Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .".

III. The Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 33 of said Rules, provides in part:

> "The court may grant a new trial to a defendant if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment . . .".

STATEMENT OF THE CASE

I. The Proceedings Below:

Petitioners were originally charged in a multiple-count indictment and after a jury trial in 1976, were found guilty of conspiracy, mail fraud and interstate travel.[1]

The Seventh Circuit affirmed by a 2-1 decision. This Supreme Court denied certiorari but did not issue an opinion.[2]

Petitioners promptly appeared before the trial court seeking a brief stay of the mandate and for leave to file their Motion for a New Trial on the next court day, and asked for an evidentiary hearing. The Government resisted.

The trial court had before it, the Rule 33 Motion for New Trial, the Government's Answer, the Reply, Defendants' Memorandum of Law, and the Defendants' Exhibits.

No evidentiary hearing was held, and on November 3rd, 1978, the trial court denied deferral for one court day to hear evidence as to the diligence of defense counsel, denied the Motion, entering but a brief minute order. The trial court issued no opinion and made no findings.[3]

Petitioners filed their Appeal to the Seventh Circuit (Nos. 78-2412 and 78-2525). The 3-judge panel heard oral arguments on June 12th, 1979 and entered its judgment and Opinion on July 11th, 1979.

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[1] *United States* v. *Craig, et al.*, 74 Cr. 879 (N.D. Ill.), invoking Title 18, United States Code 371, 1341 and 1952 respectively.

[2] *United States* v. *Craig, et al.*, 573 F. 2d 455 (7th Cir. 1977); *cert. denied* to Petitions 77-1501 and 77-1502, ... U.S. ....., 58 L. Ed. 2d 110 (1978), 47 U.S.L.W. 2188.

[3] App. B. p. 7.

II. The Material Facts from the Trial Record.

A. *Concerning the Tapes of Consensual Conversations.* During the 1973 Investigatory Phase of this matter, the Prosecutors caused their immunized Informant, Legislator Pete Pappas, to secretly tape his 1973 conversations with these Petitioners (Peter V. Pappas, no relation to the Informant, Robert Craig and others).

The Informant first taped two conversations, and those two tapes were maintained as the property of the Informant, since they could not be used until the Informant had formalized his Plea Bargain. The Plea Bargain was consummated on October 17th, 1973, and the Informant then taped two additional conversations. Those four tapes were all made on recorders in the possession of the Informant (three on his person and one under his chair).

The Indictment was issued in December, 1974 (74 Cr 879, ND Ill.).

B. Pretrial Discovery. Early in 1975, the defense filed their Rule 16 FRCP Motions, their *Brady* demands, their demands for evidence of "eavesdropping" or taping, and demanded the names of any witnesses whose testimony would be used as "hearsay" but would not themselves testify. The trial court ordered compliance therewith and with Local Rule 2.04.[4]

The Prosecutors represented they had made full compliance and full disclosure, and as to tapes, released four tapes, each containing one conversation, representing that

[4] Rule 16, Federal Rules of Criminal Procedure mandates the Government attorneys to disclose all evidence "material" to the preparation of the defense of the defendants. Local Rule 2.04 implements the federal rule. *Brady* v. *Maryland,* 373 U.S. 1 (1963) mandates full disclosure under the due process clause, of all material evidence.

these tapes memorialized those conversations and were the only such recordings. They were given exhibit numbers, Tape 101-O, 102-O, 103-O and 104-O, herein collectively referred to as the "ZERO" tapes.

In light of the Plea Bargain with their Informant and his admitted use of recorders, the prosecutorial representation thus effectively led to the obvious conclusion by the court and the defense, that the Informant had not also worn a radio transmitter. The Informant testified that the government had agreed that there would be no *other* "eavesdropping" or "monitoring" by federal agents. The "ZERO" tapes made on the Informant's recorders were the sole evidence of those conversations.

C. Pretrial Defense Motions to Suppress the Tapes. The Government conclusively advised that it would not establish any "chain of custody linking the four "ZERO" tapes to the "original" 1973 tapes. Rather, the Government chose to establish a foundation for admissibility.

Their Informant testified that in 1976, he first heard "copies" of the "ZERO" tapes, and that his recollection of the 1973 conversations, confirmed now in 1976, that the "ZERO" tapes accurately memorialized those conversations.

D. The Trial Record. The Informant repeated his foundation testimony but he himself did not relate into the record, his recollection of those four conversations. Thus, the tapes did not corroborate his testimony and were themselves the only evidence in the record of those conversations.

The Government then presented its electronics expert, Professor Weiss of New York, for his foundation testimony. Weiss testified that his examination of "ZERO" tapes had not detected any tampering with them. Trial

Trans. p. 1998. He conceded however, that if he had examined only "copies" of tapes, that his examination of those "copies" could not determine if the "originals" had been tampered with. Trial Trans. p. 2020. Nothing in the trial record disclosed that Weiss had in fact, examined only "copies" rather than "originals".

The defense also filed their *Jencks* demands, under 18 U S C 3500 et seq, but the prosecutorial compliance therewith did not disclose any evidence favorable to the defense, nor did it disclose any suppression of evidence.

E. *Concerning McBride's "Hearsay"*: James F. McBride, a redi-mix executive, was effectively immunized by the prosecutors early in 1973, but McBride was never required to testify before the Grand Jury. Though McBride was suffering from a terminal illness, his testimony was not preserved, and he passed away in January, 1975, just after the indictment was issued.

At the trial, other immunized witnesses related into the record, their version of what McBride had said to them—McBride's "hearsay". McBride's hearsay was the linchpin of the Government's case.

A Government prosecutor and a Postal Inspector had secretly interviewed McBride in 1973, but their notes of that interview were never disclosed even though that same Government prosecutor testified for the Government at the trial. After the trial, it was revealed that the Postal Inspector had filed a report relating "statements" made by McBride.[5] Thus, both *Brady* and *Jencks* violations were involved.

For that reason, the defense was unable to fully cross-examine either the immunized witnesses or the Govern-

[5] Petitioners' Exhibit # 4, the August 31st, 1973 Report by Postal Inspector Kell disclosing those interviews. Appendix C, App. 8-11.

ment prosecutor as to McBride's undisclosed "hearsay" statements—those secreted by the suppression.

F. References to the Trial Record. A more detailed "Statement of Facts" involved in this matter was set forth in a prior Petition filed in the October Term, 1977 (Petition 77-1501) together with a Supplemental Petition, wherein full citations to the Trial Record are included and which can now be referred to for reference. All of the foregoing can thus be traced to the Trial Record by referring to Petition 77-1501.

G. The "new" documents and evidence. The "new" documents are reproduced in the Appendix, and all of them were suppressed by the prosecution before and during the trial. They were not disgorged to the defense until after the trial and then only in response to defense demands under the Freedom of Information Act (5 USC 552). The prosecutors were the last to so disgorge the "new" documents previously released by the Chief Postal Inspector and the IRS. The prosecutors have since conceded that they had all of those documents before and during the trial and had not disclosed them to the defense.

In the appellate proceedings below, the government has argued that *some* of the "new" documents are not "material", and as to *some* of them that the defense was not sufficiently diligent before and during the trial.

To avoid repetition, the "new" documents and the new evidence therefrom are detailed hereinafter, in the REASONS, citing both the materiality of the documents and the diligence of the defense, despite the suppression of evidence by the prosecution.

REASONS FOR GRANTING THE WRIT

The Supreme Court should issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

The Prosecutors have conceded their suppression of evidence, and the trial court and the Seventh Circuit have sanctioned that suppression. Their actions depart so substantially from the usual course of judicial proceedings, that the Supreme Court should now exercise its supervisory powers, reverse, and correct the constitutional errors below.

This prosecutorial suppression of evidence deprived the Petitioners of a fair trial, violated their due process rights and their rights of confrontation of witnesses against them, and permitted the admission of tainted evidence resulting in an unreasonable search and seizure. This suppression carried over to the hearing of the Motion for New Trial.

The prosecutors thus did not meet those high standards dictated by the Constitution, by this Court and by the Bar itself.[6]

The reasons why this Petition should be granted, follow.

1. The Suppression of Evidence Violated Brady v. Maryland, 373 U.S. 1 (1963).

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Brady,* supra, 373 U.S. at 87.

[6] The American Bar Association's "Code of Professional Responsibility . . ." adopted August 12, 1969 mandates in EC 7-13, that ". . . the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.", and in EC 7-27, that "Because it interferes with proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce."

The Government argued below, that the defense had not "specifically requested" the suppressed evidence, narrowly interpreted *Brady* as requiring specificity in discovery demands. Petitioners refuted that argument in their Reply, but the Seventh Circuit made no specific ruling on this point.[7]

This Court, in *Brady,* affirmed that suppression was a due process violation despite the lack of specific demand and cited *Almeida* and *Thompson* so holding, with approval.[8]

Here, the defense made all of the required demands for discovery. The Government having suppressed the evidence here, cannot now demand specificity, when the defense was precluded by the very suppression from being more specific. *Brady* was violated, and the suppression here violated due process.

2. Elementary Fairness Mandates a New Trial.

The Supreme Court has set in concrete, the standards to be relied upon when reviewing prosecutorial suppression of evidence known only to the government and deliberately withheld from the defense. Where the defense has made timely demands for evidence in the hands of the government and it is instead suppressed, the defense is entitled to a new trial, upon a showing of materiality. *United States* v. *Agurs,* 427 U.S. 97 (1976).

[7] Gov. Br. p. 8-9. Def. Reply Br. p. 7-8 and Def. Br. p. 36-38.

[8] *Brady,* supra, 373 U.S. at 83, citing *Almeida* v. *Baldi,* 195 F.2d 815, 33 ALR 2d 1407 and *Thompson* v. *Dye,* 221 F.2d 763.

That the suppression occurred has been conceded. Thus, only "materiality" is involved, and the evidence may be material either as to guilt or to punishment. *Brady,* supra, 373 U.S. at 87. If the suppressed evidence is ". . . obviously of such substantial value to the defense that elementary fairness requires it to be disclosed . . .", a new trial is mandated. *Agurs, supra,* 427 U.S. at 104.

"Materiality" of the evidence is presented in the next Reason.

3. The "new" documents are "material" as to guilt and as to punishment, and meet the tests of Brady and Agurs.

A. As to the "TAPES" of the Consensual Conversation: The Trial Record indicates only a very limited prosecutorial disclosure, a disclosure of only four "ZERO" tapes, each made on a recorder in the possession of the Informant. No other tapes were disclosed. No disclosure was made that in addition to the recorder, that the Informant also wore a radio transmitter whose transmissions were received and recorded elsewhere by federal agents. The radio transmitter was used as to the last three conversations involving Tapes 102-O, 103-O and 104-O.

Moreover, the Government refused to establish any "chain of custody" linking any of the "ZERO" tapes to the "original" 1973 tapes made by the Informant. Rather, foundation evidence by the Informant and by Professor Weiss was presented to prove the authenticity and credibility of the "ZERO" tapes.

The "new" documents suppressed at the trial, later revealed the existence of nine *other* tapes, all memorializing the same 1973 conversations contained in the four "ZERO" tapes. These nine other tapes were secretly stored in

1973, in an IRS evidence locker, and the IRS maintained a secret and separate but partial "LOG" for each of the nine tapes in that locker. The LOGS themselves were suppressed. (Exhibits 18-26, Appendices A-R, App. 23-31.)

Four of those nine other tapes were made on recorders by the Informant. In December, 1974, Assistant United States Attorney Stone directed that "copies" be made of these four secret tapes, for "processing" by Professor Weiss. (Exhibits 18, 21, 24 and 26. Appendices J, M, P and R). This is "material" because if Professor Weiss used those four "copies" for his examination and tests for authenticity, then Weiss could not determine if the "originals" were tampered with, as he conceded on trial. (Trial Trans. p. 2020.)

Five of those nine secret tapes were recordings of transmissions from the secret radio transmitter worn by the Informant, and used by him simultaneously while he himself recorded the last three tapes on his own recorder in his possession (Tapes 102-O, 103-O and 104-O are affected). A nearby secreted federal agent silently received those transmissions recording them upon a recorder. These were "backup" tapes, backing up those made on the recorders. (Exhibits 19, 20, 22, 23 and 25. Appendices K, L, N, O and Q).

These five "backup" tapes are "material". Professor Weiss could have used them to either prove or disprove the authenticity of three of the four "ZERO" tapes. Moreover, since the transcripts of those "ZERO" tapes were unintelligible on numerous occasions (the term "unintelligible" being inserted in the transcript in those instances), these "backup" tapes could have been used to either fill in those gaps, or support the integrity of the conversations, or, on the other hand, to disprove the integrity of the conversations on the "ZERO" tapes.

Specifically as to Tape 103-O, a tape presented apologetically, its poor quality attributed by the prosecution to the movements by Craig in the chair housing the recorder in the Informant's room, the two "backup" tapes could have been used to either clear up that poor recording, or to prove or disprove the authenticity of Tape 103-O. The radio transmitter on the Informant's person certainly would not have been as affected by the squeaks from the chair housing the recorder.

The defense had no knowledge of the suppressed documents, and hence had no opportunity to fully examine the witnesses (the Informant and Professor Weiss) as to their foundation evidence and as to the authenticity and credibility of the "ZERO" tapes.

Other "new" documents, the IRS "LOGS" of tapes in the secret IRS evidence locker, reveal a serious gap in the custody of those nine secret tapes, and they lead to a deadend as to their final disposition and use, and they are still being suppressed. In 1975, the IRS insisted that the IRS had not conducted any Electronic surveillances". (Appendix G, EXHIBIT # 8, the April 14th, 1975 IRS disclosure to the Attorney General, and a pretrial discovery document).

After the trial, the IRS responses to FOIA demands revealed that the IRS had misrepresented in 1975, its 1973 activities. Now, the IRS admitted its 1973 participation in the tapings, that the IRS had supplied all the recording devises, all the tapes, and had stored exposed tapes in a secret IRS evidence locker in 1973-4, and that their Agent, D'Hooge took an active part in the 1973 tapings. (EXHIBITS 10 and 11, Appendices H and I, and EXHIBITS 18-26, Appendices J-R). The IRS insisted in their 1978 letter, that all of the nine tapes in the IRS

locker were released to Postal Inspector Charlton, on February 2, 1976. (EXHIBIT 11, Appendix I).

But the IRS "LOGS" themselves state otherwise. The "LOGS" disclose Dec. 1974 withdrawals of four tapes by D'Hooge and five tapes by Charlton, and no redeposit thereafter of those nine tapes into the locker. Thus, there is a 14 month hiatus, a 14 month period during which the location of the nine tapes is not disclosed. Moreover, Charlton, the last one to have them, never disclosed what he did with them. Those nine tapes are still suppressed.

Another "new" document, EXHIBIT # 7, is a material REPORT written by Postal Inspectors Kell and Greenan on October 25th, 1973. (APPENDIX E). This REPORT details that the Informant had now concluded his plea bargain, and that hence, the Postal Inspectors could now, for the first time, listen to tapes made by the Informant up to that time—October 25th, 1973. KELL-GREENAN thus report that: "The previously sealed tapes are summarized as follows." They then proceeded to reporting what they heard when listening to four recordings.

They report listening to a "copy" of a recording containing the same conversation of September 27th, 1973 as is contained on Tape 101-O, and KELL-GREENAN report what *they* heard as follows:

"— 2 —

"B. Recording on September 27, 1973 between 11:40 AM and 12:25 PM of a conversation between Peter Pappas, Peter V. Pappas and Robert Craig in the Haymarket Lounge of the Conrad Hilton Hotel, Chicago, Illinois. *Peter V. Pappas discussed his possible actions; that he could deny receiving the money reportedly paid to him, or he could take the blame for the whole thing. Peter V. Pappas told them that his wife, Mary, had been subpenaed.* There was an unrelated discussion of Mrs. Robert Craig's health; *then Peter V. Pappas left. Then Robert Craig said he had heard*

Peter V. Pappas was going to plead guilty and tell about the ready-mix industry fund. Mr. Craig said Peter V. Pappas had denied this to him prior to Pete Pappas joining the two. Robert Craig discussed with Pete Pappas, that he, Pete Pappas, should talk to Walter Hoffelder to tell him they were aware he was going to sign a note for $25,000 defense fund for Peter V. Pappas, and to assure him the four concerned legislators would come up with $5,000 each.'' (Appendix E. App. 15) (Emphasis added.)

KELL-GREENAN thus report what they heard and report words that are *not* on Tape 101-O, the tape in evidence. This is a sharp difference between the two recordings of the same conversation.

First—Kell-Greenan report that they heard on the tape they listened to, the words attributed to Peter V. Pappas, reporting they heard that *''Peter V. Pappas discussed . . .''* various incriminating facts. Yet, Tape 101-O does not contain those same words, let alone the same context—since on Tape 101-O, Peter V. Pappas did not say he would deny receiving any money or that he could take the blame for the whole thing.

Second—Kell-Greenan report that they heard on the tape they listened to—that when *''Peter V. Pappas left''*, that ''Robert Craig'' said a number of things. Yet, Tape 101-O does not contain those same words, let alone the context, since on Tape 101-O, there were but a few brief parting words—nothing else.

Thirdly, though Kell-Greenan write that their summary includes something from an interview with Pete Pappas, yet that 1973 interview could not itself reveal what Kell-Greenan *heard* when they listened to the tape. Pete Pappas himself testified that he did not hear any tapes in 1973, and did not hear them at all, until he heard copies of tapes

in 1976 for the first time. Obviously, Kell-Greenan could hardly have any input as to what they themselves heard.

It is not material now, whether the words omitted from Tape 101-O are favorable to the defense, or incriminating. What is material, is that they are *missing* from Tape 101-O —and that omission strongly suggests that Tape 101-O is inaccurate, that it was tampered with. There is no other explanation for the omission, and for the suppression of that REPORT, as well as the suppression of the recording that Kell-Greenan heard. They reported releasing that recording to the United States Attorney for transcribing—and even that transcript itself is suppressed.

Kell and Greenan were two seasoned federal investigators, and it must be presumed that they wrote in that REPORT, what they themselves heard. Their written REPORT needs no ''interpretation'' and no amount of surmising takes away the impact of what they so carefully transcribed to their superiors. The oral testimony of Kell and Greenan is nowhere in the record. The recording they heard has been suppressed. EXHIBIT #7 is ''material'', as are the missing recording heard by Kell and Greenan and the missing transcript of that recording made by the United States Attorney in 1973.

Reviewing now, all of the ''new'' documents in context with the trial record, the ''ZERO'' tapes are now so faulted, their credibility and authenticity so undermined, that the defense are denied due process if the courts continue to sanction the suppression and to ignore the ''new'' documents. Admission of those tainted tapes violates unreasonable search and seizure prohibitions.

Since the ''ZERO'' tapes were the cornerstone of the Government's case, and the *sole* evidence in the trial record of those conversations, it is apparent that without the

"ZERO" tapes in evidence, that the case would have been entirely different. More than a reasonable doubt could have been created in the minds of the jury. The sentencing considerations would have been tempered and more favorable consideration given to the defendants. It is inescapable that the results could have been different, as to guilt and as to punishment.

B. *As to McBride and his "hearsay"*. The Trial Record discloses that McBride though immunized, did not testify before the Grand Jury, passed away just one month after the Indictment was returned, and before the trial. His "hearsay" however, was related by his immunized co-conspirators. The prosecution released no *Brady* or *Jencks* evidence as to McBride's pre-trial testimony or statements, and did not disclose any interviews with McBride.

The "new" evidence revealed otherwise. Postal Inspector Kell submitted his written REPORT of August 31st, 1973, and a copy of that report was with the prosecution at the trial, but suppressed. (Exhibit 7, Appendix E) In that Report, Kell disclosed that:

> *First*: He and two other Postal Inspectors had interviewed McBride twice between August 16th and 31st, 1973. This Report did not disclose what McBride said to them. No other evidence has yet been disgorged disclosing that information.
>
> *Second*: He and Assistant U. S. Attorney Stone interviewed McBride on August 31st, 1973. Kell reported that McBride admitted to them, that Peter V. Pappas, this Petitioner, ". . . . made no attempts to influence or obstruct . . ." McBride from testifying truthfully. Stone's report of that same interview is still being suppressed.

No *Brady* disclosures, and no *Jencks* disclosures were made, despite the fact that Stone himself testified as a government witness.

Despite that Kell Report, on trial, the prosecution urged that Peter V. Pappas had sought to influence or obstruct others from testifying truthfully. There was no such charge in the Indictment, and this prosecutorial slur was obviously intended to adversely influence the jury and the judge. By suppressing this McBride interview and by assuring that Stone (the Government's prosecutor-witness) would not reveal this evidence favorable to this petitioner, that adverse prosecutorial accusation remained unrefuted at the trial. That is detrimental, if not as to guilt, at least as to punishment.

There were violations of *Brady* and *Jencks,* supra, and the defense was denied of its full rights to confront the witnesses against them as guaranteed by the Sixth Amendment. Unaware of the suppressed interviews with McBride and his statements to the postal inspectors (two of those interviews are still suppressed), the defense could not fully cross-examine the immunized witnesses who quoted McBride throughout the trial.

C. *Conclusion*: The suppressed evidence was "material" to the defense, and could readily have induced a reasonable doubt in the minds of the jury and of the judge, as to guilt, and as to punishment. That prosecutorial suppression did not ". . . comport with that high standard . . ." demanded of prosecutors by the Attorney General, as noted by former Justice Clark, in *United States* v. *Mele,* 462 F. 2d 918, 926 (2d Cir. 1972). The defendants are thus entitled to a new trial. *United States* v. *Kahn,* 472 F. 2d 272 (2d Cir. 1973); *United States* v. *Rosner,* 516 F. 2d 269, (2d Cir. 1975).

4. The Suppression of Evidence Violated the Jencks Act (18 USC 3500 et seq).

The district court, not the Government and its prosecutors, is the arbiter of whether statements are producible

under *Jencks,* 18 USC 3500 et seq. *Palermo* v. *United States,* 360 U.S. 343, 354 (1959).

Here, there were suppressed, nine tapes, all containing "statements" of Informant Peter Pappas, witness for the government.

There was the Report of Postal Inspector Kell revealing his interview together with Assistant U.S. Attorney Stone, of McBride, and the contents of that interview. Stone was a government witness. The Kell Report was suppressed, and any report that Stone himself filed, was suppressed and still is. That Kell report comes within *Jencks.* (Exhibit 4, Appendix C, App. 8-11)

There were the IRS "LOGS" of the IRS evidence locker, disclosing actions taken by Assistant U. S. Attorney Stone in ordering "copies" made for "processing" by Professor Weiss. These "LOGS" were suppressed, though Stone testified as a government witness. (Exhibits 18, 21, 24, 26, Appendices J, M, P and R.)

The prosecution, in suppressing those and other pertinent documents coming under the *Jencks* mandate to disclose, took upon itself, the judicial authority of the district court, doing so secretly. The Government thus made a deliberate and prejudicial determination of what was and what was not producible under *Jencks.* The prosecution even failed to comply with a practise mandated by this Court in such a situation. It failed to submit that *"Jencks"* evidence to the trial judge for an *in camera* determination. *Palermo,* supra, 360 U.S. at 354. It was prejudicial not to resort to such an *in camera* inspection.

5. The courts below did not meet Agurs standards requiring evaluation of the entire record.

> "... if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record."

to determine if a reasonable doubt has been created. *United States* v. *Agurs,* 427 U.S. at 112.

Here, the Seventh Circuit, in considering the Petitioners' arguments as to the lack of a "chain of custody", departed from that *Agurs standard* by not examining and evaluating the entire record, and in holding that:

> "The defendants have argued that the *trial record* failed to establish a 'chain of custody' of the taped recordings." (Emphasis added). (App. A, p. 5)

Thus, the Seventh Circuit ignored the "new" documents.

The Appellants (Defendants) below did not merely rely upon the *trial record.* They cited and relied upon the "new" evidence in context with the "old" evidence.[9]

For example, the trial record disclosed that in 1973, two sets of exposed tapes containing the same 1973 conversations, were in two different places simultaneously. Each set of exposed tapes were represented to be "originals". The trail to each set of exposed tapes, led to a deadend, without any link to the "ZERO" Tapes.

Thus, *Trail No. 1* in the trial record led from the Informant directly to IRS Agent D'Hooge, since the Informant testified that in 1973, each time he taped on his recorder, he released the "original" tape directly to D'Hooge. This was a deadend, since D'Hooge never testi-

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[9] App. Br. p. 15-18.

fied as to what he did with those "original" tapes. Nor did anyone else.

Trail No. 2 in the trial record led to Attorney Winstein, the Informant's Attorney. The Informant testified that in 1973, the "original" tapes were to be delivered to Winstein, and Winstein testified that in 1973, he received what he deemed to be, the "original" tapes and that in 1976, he still had them. Thus, this was the second deadend. Winstein confirmed this deadend by testifying that he, Winstein, did not know the source of the "ZERO" tapes in evidence before the trial court.

Now, the "new" documents revealed still a third deadend trail, commenced in 1973, with a third set of exposed tapes containing the same 1973 conversations. The third trail led to a "deadend" again, since there was and is no link between this third set of tapes and the "ZERO" Tapes. The "new" documents disclosing this *Trail No. 3,* are the IRS "LOGS" of the nine tapes secretly stored in an IRS evidence locker in 1973. These nine tapes were deposited in the locker, as noted by the LOGS, in late 1973, and they remained there, until December, 1974. The "LOGS" reveal that four of those tapes made on recorders by the Informant, were released to IRS Agent D'Hooge, in December, 1974, but there is no direct link then to the "ZERO" tapes. The "LOGS" further reveal that five of those tapes, made from transmissions of a radio transmitter worn by the Informant, were released to Postal Inspector Charlton, in December, 1974, but there is no direct link then to the "ZERO" tapes. Thus, these nine tapes led to a deadend in December, 1974. (Exhibits 18-26, Appendices J-R, App. 23-31).

The IRS then, in 1978, insisted by letter, that the same nine tapes mentioned in their own LOGS, were released to Postal Inspector Charlton, in February, 1976, 14 months

after the "LOGS" disclosed final release. The LOGS did not contain any re-entry to the locker after December, 1974. Again, there is no link between any tapes that Charlton received in February, 1976 and the "ZERO" tapes in evidence.

Thus—in 1973—there were three different sets of exposed tapes, each containing the same 1973 conversations—and stored in three different places simultaneously, without any reasonable explanation as to this phenomena, and without any explanation as to why the government suppressed this new evidence.

Obviously, the defendants did not merely rely upon the "trial record" in asserting that there was no "chain of custody" to link the "ZERO" tapes to the "original" 1973 tapes. The Seventh Circuit in its ruling committed error, did not meet the *Agurs* standards in considering the appeal below, and did not give full and fair consideration to the "new" documents. This failure is of such magnitude, that this Court should exercise its supervisory powers to correct that prejudicial error.

6. The Seventh Circuit denied the Defendants a fair hearing and due process, in holding that the defense had failed to pursue pretrial evidence and hence lacked diligence.

The Defendants submitted 24 "new" documents in support of their Rule 33 Motion for New Trial, the Government conceding that they were suppressed and "new". The suppression of the use of a radio transmitter and tapes therefrom was involved in some of those documents.

The Seventh Circuit held that:

> "The defendants have argued that they were under the impression that no radio transmitters were used.

> They were told otherwise before the trial by the Chief Postal Inspector's letter and their failure to pursue indicates lack of diligence.''. (App. A, p. 5)

The Seventh Circuit was referring to an April 14th, 1975 Pre-trial Exhibit, a letter from the Chief Postal Inspector to the Attorney General, conceding the tapings, and asserting that in 1973:

> ''Oral or telephone conversations of the following defendants were *monitored and recorded. . . .*'' (Emphasis added). Exhibit 9, Appendix F, App. 17-18)

In subsequent discovery proceedings implementing that April 14th, 1975 letter, the Government disclosed its evidence—the ''ZERO'' tapes—the only evidence of the conversations that were *''monitored and recorded''*. The four ''ZERO'' tapes, *one* for each conversation, each made on a recorder in the possession of the Informant, were the *sole* evidence of any *''monitoring and recording''*. The Informant in his testimony, related only his evidence as to the recorder supplied to him by D'Hooge and how D'Hooge activated and de-activated the recorder each time and then removed the exposed tape. The Informant did not mention one iota of evidence that he also wore a radio transmitter. All evidence of the existence and use of a radio transmitter and the recording of its transmissions, was suppressed. With only limited disclosure of use of only a recorder by the Informant, coupled with the suppression of his use of a radio transmitter, the Government directly represented to the Court and to the defense, that there were no other tapes and that a radio transmitter had not been used. The Government prosecutors, fully aware of the use of the radio transmitter and of the existence of the five ''backup'' tapes, structured their direct examination of the Informant so as to effectively suppress any leak as to the use of the radio transmitter.

In response and defense of those tactics, the Government argued below that it had never *denied* the use of a radio transmitter. Their suppression and the overt omission of that fact needed no affirmative denial—rather full disclosure mandated an affirmative response and admission, and supplying all of that evidence that was withheld from the defense.

Only the ''new'' documents finally disclosed the secret use of the radio transmitter and the production of the five ''backup'' tapes recording the transmissions. (Exhibits 6, 19, 20, 22, 23 and 24. Appendices D, K, L, N, O and P.)

These orchestrated limited disclosures coupled with the suppressions, did not require more diligence than displayed by the defense. The Seventh Circuit ignored its own ruling that failure by the defense to follow up on information obtained at a preliminary hearing was excusable, because the prosecutor knew of an inaccuracy in that information, and failed to correct it. *United States* v. *Poole,* 379 F. 2d 647 (7th Cir. 1967). This case is on all fours with *Poole,* since here, the prosecutor knew full well, that the suppression of evidence of the use of the radio transmitter led to an inaccuracy—an inaccurate assumption by the defense, that a radio transmitter was not used.

We need only note that:

> ''. . . But appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure . . . may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resource, to be the 'winner'.'' *Levin* v. *Katzenbach,* 363 F. 2d 287, 291 (App. D.C., 1966) and its footnotes nos. 13, 14 at p. 291.

Certainly, *Poole* and *Levin* support these defendants in their assertions of due diligence.

Finally, lack of diligence as to only *one* Pretrial document released in the preliminary stages as in *Poole,* followed by suppression of evidence intended to mislead the defense and to create a gross inaccuracy as to the truth, hardly comports with the examination of the suppressed documents in full context with the trial record, as is mandated by *Agurs,* supra, 427 U.S. 97, 104 (1976). Failure to give such consideration below is contrary to elementary fairness.

7. The Courts below failed to hold the Government to its burden of establishing beyond a reasonable doubt, that denial of Sixth Amendment Rights to fully confront Witnesses Against the Defendants, was not prejudicial.

Petitioners raised this Argument on Appeal, and though the Government on brief resisted this argument, later, on oral argument, the Government withdrew its "harmless error" position.

Here, the new evidence establishes sufficient "material" evidence that the defense should have had access to, in order to fully cross-examine various government witnesses.

The "new" evidence as to the tapes, could have been a basis for a fuller cross-examination of the Informant, of Professor Weiss, of United States Attorney Skinner and of his assistant, Stone.

The "new" evidence as to McBride, and the other evidence still under suppression (contents of the two still secret McBride interviews), could have been a basis for a fuller cross-examination of all the government witnesses who quoted McBride—the Informant and the immunized industry co-conspirators, and even questioned the *use* of the interviewers as defense witnesses.

A denial of such Sixth Amendment rights is a due process violation. Moreover, no amount of a showing of *want of prejudice* cures that deprivation and violation. Rather, the government has the strict burden of proof to establish, beyond a reasonable doubt, that the Sixth Amendment denial was "harmless". *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Smith* v. *Illinois,* 390 U.S. 129 (1968).

That such confrontation was thwarted goes without question. The extent of the prejudice to the defendants can only be revealed at a new trial. Since the government abandoned its "harmless" argument, the court below committed constitutional error in not reversing. The Petitioners were prejudiced by the denial of their rights of confrontation.

8. The Seventh Circuit denied the Petitioners due process, a "fair" hearing on appeal, and failed to comply with Agurs, supra, by its holding that a defense argument ". . . was not made in the district court and was waived as to this appeal.". (Appendix A, App. 5)

During the trial below, the government called upon Professor Weiss, a New York electronics expert, to give his testimony as foundation for the authenticity of the "ZERO" tapes—that they had not been tampered with. Weiss, in testifying about his examination of "ZERO" tapes, said that he had not detected any tampering with those "ZERO" tapes (Trial Trans. p. 1998.) However, he also conceded, that if he had examined only "copies" of tapes instead of "originals", that his examination of such "copies" could not detect whether the "originals" had been tampered with. (Trial Trans. p. 2020.) At that point and during the entire trial, there was no evidence to suggest that Weiss had really examined only "copies" instead of "originals".

Assistant United States Attorney Stone testified as a government Witness, but he did not disclose any evidence as to his knowledge of whether Weiss had examined only "copies". Moreover, no *Jencks* evidence as to Stone, was released to the defense.

The defense Rule 33 Motion and exhibits raised the argument, that the "new" documents revealed that Assistant United States Attorney Stone had ordered in December, 1974, that "Copies" be made of four tapes in an IRS evidence locker, for "processing" by Professor Weiss. (Exhibits 18, 21, 24 and 26, Appendices J, M, P and R, the IRS "LOGS" of those four tapes each made on a recorder by the Informant and stored in the locker but not linked in any way to the "ZERO" tapes.) The Government's Answer to the Rule 33 Motion and the said Exhibits before them, did not raise "waiver" as to *this* Argument, and it was buttressed by the Defense in their Reply.

On appeal to the Seventh Circuit, the defense raised that same argument as to the invalidity of the Weiss foundation testimony, presenting the same "new" documents in support as were submitted to the district court. The Government's Answer Brief specifically raised the "waiver" issue for the first time, that the defendants had waived because they had not presented this argument to the district court *during the trial.* The Reply rebutted that "waiver" argument.[10]

The Seventh Circuit held that the defense had waived this argument on appeal, by not raising it during the trial before the district court. (Appendix A, App. 5).

First, there could not have been a defense "waiver" during the trial. A "waiver" must be "knowingly" made.

[10] Gov. Br. p. 15-16. Reply, p. 13-14.

Since the Government during the trial, had suppressed all evidence of the nine "secret" tapes, of the existence of the IRS evidence locker and of the "LOGS" of the tapes in that locker, the defense had to be unaware that Stone had ordered "copies" to be made for delivery to Weiss. There could not have been a "knowing" waiver during the trial.

Secondly, if there was a "waiver", it was by the Government, when it failed, during the hearing of the Rule 33 Motion, to there specifically raise the "waiver" argument as to this Weiss point.

Thirdly, whether in fact, Weiss received "original" tapes, or merely "copies", is, now on appeal and on Review here, a *"fact"* issue—an issue determinable only at the district court level.

The critical foundation evidence of Professor Weiss goes to the very heart of the issue. If his foundation testimony is irreparably faulted because he tested only "copies" of tapes, then obviously, the "ZERO" tapes cannot be admitted as evidence. If the "ZERO" tapes were not in evidence, then there would not have been *any* evidence of the conversations supposedly memorialized by the "ZERO" tapes. The entire complexion of the trial, and of the consideration of the punishment to be meted out, would have changed—favorably to the defense.

Due Process considerations mandated consideration to the Weiss arguments posed by the Defendants below. *Agurs,* supra, mandated consideration below, of the "new" documents in full context with the trial record. The Seventh Circuit failed in those respects, prejudiously as to these Defendants.

9. The Tapes, the Government's only evidence of the conversations, are so tainted, that a new trial is mandated.

During the trial, the Informant merely testified that he had held the 1973 conversations, and that upon listening in 1976, to "copies" of the "ZERO" tapes, that the "ZERO" tapes conformed to his 1976 recollections of the 1973 conversations. He did not relate their contents into the record, and hence was not cross-examined as to those conversations.

Thus, the tapes themselves, the "ZERO" tapes, were independent, third-party evidence of the conversations. *Monroe* v. *United States,* 234 F. 2d 49 (App. DC 1956). Moreover, the tapes do not come within the umbrella of *Lopez* v. *United States,* 373 U.S. 427 (1966) and *Osborn* v. *United States,* 385 U.S. 332 (1966), where the tapes corroborated the Informant's testimony. That corroboration in *Lopez* and *Osborn* was the basis for this Court's holding there, that there was no Fourth Amendment unreasonable search and seizure. Furthermore, one cannot cross-examine a tape.

The "new" documents have tainted the "ZERO" tapes. The suppression of evidence by the government has enhanced that taint. As in *Mesarosh,* the tainted tapes have so ". . . poisoned the water in the reservoir, . . . the reservoir cannot be cleaned without first draining it of all impurity. . . . The interests of justice call for a reversal of the judgment below with direction to grant the petitioners a new trial.". *Mesarosh* v. *United States,* 352 U.S. 1, 14 (1956).

10. The Exclusionary Rule should be applied here to express these "ZERO" tapes.

Petitioners argued below, that the United States Attorney who headed the 1973 investigation here, had not complied with the Attorney General's Guidelines mandating advance written authority to tape consensual conversations, and that thus, the "ZERO" tapes should be suppressed.[11]

The Seventh Circuit, relying upon *Caceres,* rejected the Petitioners' arguments. *United States* v. *Caceres,* ..... U.S. ....., 99 S.Ct. 1979, 59 L. Ed. 2d 733 (1979). (Appendix A, p. 5-6.). In so doing, the Seventh Circuit extended *Caceres* beyond its limited confines. This Court should now act to determine an important federal question. Should the Exclusionary Rule apply where the United States Attorney uses a secret Informant to tape, and does so without himself complying with the Guidelines of his superior, the Attorney General? Should not such tapes be suppressed?

Caceres is readily distinguishable from the case here, and *Caceres* should be limited to its facts.

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[11] The October, 1972 Attorney General Guidelines, in effect during this Investigation, required that the "head" of an investigation, or, his "deputy", seek in writing, in advance, the written permission of the Attorney General to record a consensual conversation. Those Guidelines prohibited any further *re-delegation* of that mandate. United States Attorney Thompson headed the 1973 investigation and he in turn delegated the matter unto Sam Skinner, his deputy. At the 1976 proceedings, then United States Attorney Skinner testified about his 1973 activities, that he led the investigation, and that Skinner enlisted IRS Agent D'Hooge ". . . in our cause" and to lead the taping team including D'Hooge, Assistant United States Attorney Stone, and Postal Inspectors Kell and Greenan. D'Hooge himself always checked with Skinner as to whom to tape and when. (Transcript, Motion to Suppress, p. 472-3.)

First—in *Caceres,* the IRS was the head of its own tax fraud investigation. There was no involvement with a United States Attorney. Here, the investigation was initiated and headed by the United States Attorney and his chief deputy. They formed the investigating team and called in the IRS and the Chief Postal Inspector and directed that team to make the tapes. Thus, though the United States Attorney was empowered under the Guidelines to delegate his functions to his deputy, an Assistant United States Attorney (Mr. Skinner), neither he nor Mr. Skinner were empowered to *re-delegate* their functions to the Chief Postal Inspector, as was done here. (Exhibit 4, Appendix C, Para. 1; Exhibit 6, Appendix D, Para. 1; Exhibit 7, Appendix E, Para. 1.)

Secondly—in *Caceres,* the taxpayer was dealing with a known quantity—as IRS auditor investigating tax fraud, and the taxpayer offered a bribe. Later, the IRS Agent returned to complete his investigation, but this time equipped to tape the bribe offer. The IRS Agent did tape it to protect himself and to corroborate his oral testimony later, just as in *Lopez* v. *United States,* 373 U.S. 427 (1963). *Lopez* and *Caceres* are on all fours.

The IRS Agent in *Caceres* was on official business—he wore his badge openly and he taped to protect his status as a federal tax investigator, to protect the interests of the United States itself.

Here, the Informant was selected by the prosecutors and directed by them to pose as a "friend" and as a "target" of the same investigation and to suppress his role as an informer. He did not wear his badge openly. Here, the Informant was not being offered nor ever was offered any bribe. The Informant here, agreed to tape in order to enhance his own chances for a plea bargain—for his own private purposes—not to protect the government.

In *Caceres,* the tapes were used to corroborate the IRS agent. Here, the tapes were themselves, the sole evidence of the conversations, since the Informant did not himself relate the conversations in testimony. The "ZERO" tapes were independent third-party evidence. The Informant here was not within *Lopez.*

In *Caceras,* the IRS agent taped to record an actual and ongoing crime—bribery. *Caceras* thus dealt only with the Fourth Amendment and was not involved with past crimes. Here, the Informant claimed that he was taping to detect an obstruction of justice—and none ever surfaced, since no-one was ever charged with that crime. Instead, the Informant here sought evidence of a past crime thus invoking the Fifth Amendment. Reliability of his tapes must be assured in this instance.

Finally, the United States Attorney and his deputy, stand on a much higher plateau than IRS Auditors. The IRS Auditors are not out to do "justice"—they are tax collectors. Federal prosecutors are officers of the Court and have sworn to uphold the Constitution, federal laws and to honor the directives of their superior—the Attorney General. They are sworn to do justice. Former Justice Clark, in recalling his role as Attorney General, recalled a sign in his office in *Justice,* that:

> "The United States wins its point whenever justice is done its citizens in its courts.".

Justice Clark relied upon that standard in directing a new trial because of prosecutorial failure to comport with that standard in *United States* v. *Mele,* 462 F. 2d 918, 926 (2d Cir. 1972). There the prosecution had also concealed evidence.

The non-compliance here by the United States Attorney and his deputy with those Guidelines, coupled with the suppression of evidence by the prosecution, mandates that the

Exclusionary Rule be applied here, and the tapes suppressed. *Caceres* limitations based upon the noncompliance by a tax collector are hardly appropriate to the situation here.

As a matter of federal law, the Exclusionary Rule should apply here.

11. None of the protections afforded tapes made under a court order were honored here. Those protections are equally important to assure the integrity of tapes of consensual conversations, particularly when no "chain of custody" is established to link the tapes placed in evidence, to the "original" tapes.

The Appellants on brief below, detailed the lack of a "chain of custody" linking the "ZERO" tapes to the "original" 1973 tapes. This is briefly explained hereinbefore. (Reason No. 5.)

Though Congress has provided that where wire taps are ordered, that tapes be made of the overhearings and that the tapes be promptly sealed and delivered to the ordering Court for safekeeping, no such safeguards were set forth for tapes identified as "consensual". Thus, the sealing by the Court mandated by 18 USC 2518(8)(a) was not extended to tapes made by Informants with their prior consent under 18 USC 2511(2)(c).

However, the integrity and authenticity of such tapes, be they court-ordered or "consensual" is important. This is particularly so when the Government does not, as was the case here, prove a "chain of custody" linking the "ZERO" tapes in evidence, with the "original" tapes.

The importance of protecting such tapes is stressed in two recent publications on "electronic surveillances", by

two of the foremost authorities on the subject. We refer to Messrs Carr and Fishman.[12]

Both authors categorically recommend that all tapes, whether "consensual" or court-ordered, be protected with safeguards to assure their integrity and authenticity. The safeguards that they recommend are:[13]

- Only new, unused tapes may be used. Tapes previously erased or used, are forbidden.
- Each Tape must be specifically numbered, in advance of usage.
- A "LOG" must be maintained for each tape, separately, containing the full history of the tape, when it is copied and by whom, when it is played and by whom, when it was withdrawn and when redeposited, and when finally withdrawn, its disposition.
- The recording device to be used must be tested in advance to assure it is in working order and a "LOG" maintained of its use. It must be capable of making the recording.
- The "LOG" of the recorder must have an entry showing that it is being used to record a conversation on the specific tape identified by its number.
- The recording device must be checked upon its return to assure that in fact, it did work. This may be done with a test tape recorded before it is checked out, not-

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[12] "The Law of Electronic Surveillance", by James B. Carr, Clark Boardman Co., publishers, and to "Wiretapping and Eavesdropping", by Clifford S. Fishman, Bancroft-Whitney Co., publishers. Mr. Carr was Chairman of the National Commission reviewing surveillances for Congress, after the enactment of the Omnibus Crime Law of 1968. Mr. Fishman of the New York Bar, wrote, supervised and executed, and then litigated the validity of over 40 wiretaps and bugs.

[13] *Carr*, supra, p. 281-2, *Fishman*, supra, p. 31, 517-522.

ing its use, and later recording on that same test tape, its actual use with Tape No. .....

- The specific TAPE inserted in the RECORDER, should have recorded on it, a "heading", preferably made by the Informant just before he embarks on his mission, as: "This is Informant X using Tape No. 101 on Recorder 79, and I am taping on September 27th, 1973 at 12:00 noon, a conversation with X and Y at ....."
- After the taping, the tape should immediately be placed, "individually", "under seal", in an individual secure place. It should not be sealed collectively, with other tapes.
- There must be selected and limited access to that secure place and the LOG reflect that access, each time.
- The exposed tape should not be removed without a court order and the LOG should so note.

The foregoing are all *preludes* to a court-ordered tape, and all of them should be complied with in the handling of "consensual" tapes. Here, there was a cavalier noncompliance as to the "original" tapes or the "ZERO" tapes.

Here, there was no proof that the tapes used, were new, nor were they numbered in advance. Neither the Informant, nor IRS Agent D'Hooge checked the recorder, either before nor after each taping, to see if the recorder worked. No "heading" was taped on any tape. The tapes were not "under seal". There was no evidence as to the security of the IRS evidence locker, nor whether each tape was separately "sealed". No record was kept as to who listened to the "ZERO" tapes, nor as to who made "copies" thereof. No record was kept as to who listened to the nine secret tapes. No court order was ever secured for any

withdrawal of any tapes from the IRS locker. No record was kept as to what finally happened to the nine tapes removed from the evidence locker. There was no "chain of custody" linking up the "ZERO" tapes either to the 1973 "originals", or to the nine secret tapes in the evidence locker.

This Court should now, as a matter of federal law, determine what protection is necessary to protect "consensual" tapes, and to assure the "integrity" of tapes. Prosecutors should not be permitted at will, to handle such tapes in a cavalier fashion, with impugnity.

In light of the suppression of evidence here, the lack of any "chain of custody" and even the noncompliances by the United States Attorney with the Guidelines, the Exclusionary Rule should be applied to suppress tapes such as those here, despite the lack of any statutory standards. The lack of such legislative standards is hardly a basis to ignore the problem. To sanction the admission of tapes that do not meet those *Fishman-Carr* minimal protective standards, is not a usual standard of judicial proceedings. It is unusual. It is not unimportant in the American scheme of justice.

Conclusion.

Wherefore, for the above and foregoing reasons, the Petitioners respectfully pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PETER V. PAPPAS, Pro Se
NICHOLAS C. AVGERIN *of Counsel*

ANNA R. LAVIN
EDWARD J. CALIHAN,
for Robert Craig.

August 10, 1979.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-2412 and 78-2525

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER V. PAPPAS and ROBERT CRAIG,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 879—**George N. Leighton**, *Judge.*

ARGUED JUNE 12, 1979—DECIDED JULY 11, 1979

Before PELL, SPRECHER and TONE, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The denial by the district court of a new trial based on newly discovered evidence is affirmed by us.

I

The defendants Craig and Peter V. Pappas and others were indicted in a scheme wherein persons associated with the ready-mix concrete industry bribed members of the Illinois General Assembly in order to obtain

favorable legislation.[1] Both of them and others were charged in a 14 count indictment with conspiracy to commit mail fraud, 11 counts of substantive mail fraud, and 2 counts of Travel Act violations. They were both found guilty as charged and each was sentenced to a prison term and fine.

The convictions were affirmed by this court on appeal. *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3221 (1978). The defendants then filed a motion for a new trial, based on newly discovered evidence, under F.R.Crim.P. 33,[2] which was denied by the district court on November 3, 1978. The defendants have appealed that ruling.

II

The first alleged "new evidence" related to government exhibit 101-0, a tape recording of a September 27, 1973 conversation among Craig, Peter V. Pappas and Pete Pappas. The defendants obtained through the

[1] Craig was one of the bribed legislators and Peter V. Pappas was the liaison employee of the Illinois Secretary of State. Peter V. Pappas was referred to by his full name in these proceedings in order to distinguish him from Pete Pappas (no relation) who was another legislator. Pete Pappas entered into an agreement with the government whereby in return for his cooperation and trial testimony, he was permitted to plead guilty to a lesser charge and placed on probation.

[2] Rule 33 provides as follows:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Freedom of Information Act several documents, including some postal inspector reports.

One report dated October 25, 1973, prepared by postal inspectors Kell and Greenan, referred to the tape recording of September 27. The defendants contended that the reference to that recording contains some material which does not appear on the recording admitted in evidence during their trial.

The Kell-Greenan report purports to summarize from different recordings and states thereafter (emphasis added):

> The brief summaries above are from a *partial* playback of copies of the tapes, *and interview* of Pete Pappas.

At the trial of the defendants, Pete Pappas testified that when he listened to the September 27, 1973, recording two-and-one-half years later he "noted that some parts of the tape were unintelligible." 573 F.2d at 478. When he was interviewed by the postal inspectors within a month of a conversation, he was obviously able to supply the unintelligible portions, which accounts for the postal report containing some information not heard on the recording admitted in evidence.

Therefore the postal report does not impeach exhibit 101-0. Further the additional information supplied to the inspectors by Pete Pappas tends to be inculpatory and not exculpatory of the defendants. As the government pointed out, "Pete Pappas was exhaustively cross-examined at trial by several able and experienced attorneys." The defendants had full opportunity to develop from him the portions of the tape which were unintelligible.

Thus this "new" evidence does not tend to show that another copy of the September 27 recording was in existence, or that there was any tampering with the tape, or that there was any violation of *Brady v. Maryland*, 373 U.S. 1 (1963).

III

The second area of "new" evidence consisted of the defendants learning that the other two government exhibits (102-0 and 103-0), consisting of tape recordings picked up by Pete Pappas while conversing with the defendants, were also monitored by radio transmitter, and so-called "back-up" tapes were made by government agents while the original tape attached to the body of Pete Pappas was recorded.

To warrant granting a motion for a new trial based on newly discovered evidence, it must be shown (1) that the evidence was discovered since the trial; (2) that the evidence could not have been discovered earlier with the exercise of due diligence; (3) that the evidence is not merely cumulative or impeaching; and (4) that the evidence is so material that it probably would produce a different verdict. *United States v. Ellison*, 557 F.2d 128, 133 n.2 (7th Cir. 1977).

Prior to the trial the government filed a "Statement and Affidavit Regarding Electronic Surveillance," to which was attached a letter dated April 14, 1975 signed by the Chief Postal Inspector, which stated in part (emphasis added):

> *Oral or telephone conversations* of the following defendants *were monitored and recorded* with the prior consent of one of the parties to the conversations . . . [listing Craig and Peter V. Pappas among others].

The primary meaning of "monitor" is "to check and sometimes to adjust (as a radio or television signal, channel, or program) for quality or fidelity to a band by means of a receiver . . . ." The secondary meaning is "to check (as a radio or telephone broadcast or a telephone conversation) for military, political, or criminal significance by means of a receiver." Webster's Third New International Dictionary (Unabridged, 1966). The use of a receiver requires the use of radio transmitters.

The defendants have argued that they were under the impression that no radio transmitters were used. They were told otherwise before trial by the Chief Postal

Inspector's letter and their failure to pursue it indicates lack of diligence.

IV

The defendants have argued that the trial record failed to establish a "chain of custody" of the taped recordings. The same argument was made and rejected by this court upon the direct appeal. At 573 F.2d at 478 we said:

> No chain of custody of the tapes was proven at trial. Notwithstanding this lack of proof, however, we feel that the tapes were admissible because a proper foundation had been demonstrated.

Next the defendants contended that the Internal Revenue Service logs now available to them show that copies of the tapes were made in 1974 for "possible processing" (101-0), "for processing" (102-0) and "for possible use by Marc Weis" (103-0) and that this indicates that the tapes delivered to Weis in 1976 were copies and not originals. Our opinion upon the direct appeal considered in detail the method of processing by Weis. It does not follow that if copies were made in 1974, the originals were not delivered to Weis in 1976. In addition, this argument was not made in the district court and was waived as to this appeal.

The defendants have argued that they have newly learned that James McBride, an employee of a ready-mix concrete company who was an unindicted conspirator and deceased at the time of trial, told postal inspectors on August 28, 1973 that Peter V. Pappas, who had earlier that day visited McBride, did not attempt to influence him or obstruct him from testifying. The fact that Peter V. Pappas did not try to influence McBride on August 28 is a negative fact and has no bearing on other evidence that he attempted to influence other people at other times.

Finally the defendants have argued that the government did not comply with the Attorney General's guidelines for the consensual recordings of conversations.

Shortly after this court's opinion affirming the convictions on direct appeal, Craig and Peter V. Pappas moved in this court (which retained jurisdiction pending disposition of petitions for rehearing) to permit the district court to conduct a hearing on whether the guidelines were followed in this case. This court denied the motion. Having read the record and parties' briefs in this appeal, we conclude that the guidelines were substantially complied with in all respects.

The district court judgment denying a new trial is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 74 CR 879-8 Date 11-3-78

Title of Cause UNITED STATES OF AMERICA v. PETER V. PAPPAS

Brief Statement of Motion Ruling on Post Mandate motions

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

A true copy-Attest
H. Stuart Cunningham, Clerk
By Patricia Palumbo
Deputy Clerk
U. S. District Court, Northern District of Illinois
Date: 29 NOV 1978

Leighton J.

Reserve space below for notations by minute clerk

Oral motion of Sherman C. Magidson for leave to withdraw as counsel for the defendant Peter V. Pappas, is granted.

Motion of Peter V. Pappas for a new trial is hereby denied.
Rule 35 motion of the defendant Peter V. Pappas is also den
The sentence heretofore imposed on the defendant Peter V. P
is hereby amended to the extent that the sentence is impose
pursuant to the provisions of Title 18, Section 4205(b)(2).

DRAFT

APPENDIX C

DISTRIBUTION	CTL. NO.
Chief Inspector	✓
Operations, OMO/PAS	
Operations, Maint. Div.	
Finance & Admin., OMC	
Gener' Counsel, Claims	
Money Order Division	
Regional Director	
Regional Counsel	
Postal Data Center	✓
CI — Central Region Feb 6, 0/c Ops	
File	✓

DATE: SEP 4 1973 INITIALS: MH MH

U.S. POSTAL SERVICE
CHIEF INSPECTOR'S DEPARTMENT

REPORT OF POSTAL INSPECTOR

TYPE OF REPORT: ☒ PRELIM ☐ FINAL ☐ SPECIAL ☐ SUPPLEMENTAL

OFFICE, CLASS, REFERENCES: CHICAGO, ILLINOIS

DATE: August 31, 1973 CASE NO.: 275-11254-F

SUBJECT:
MISCELLANEOUS (REFERRAL)
ALLEGED VIOLATORS: UNKNOWN STATE LEGISLATORS

ELECTRONIC SURVEILLANCE - REFERRAL TO CHIEF INSPECTOR, ORGANIZED CRIME DIVISION

LIMITED OFFICIAL USE

POSTAL INSPECTOR: K. D. Kall rcf

POSTAL INSPECTOR IN CHARGE: Chicago, Illinois 60607

1. Personal attention has been given this case at Chicago, IL on various dates since July 30, 1973. Basis for this investigation is the request by Mr. Samuel K. Skinner, Chief Special Investigation Unit, United States Attorney's Office, Chicago, IL, to Mr. M. J. McGee, Chief Regional Postal Inspector, Central Region, Chicago, IL, through the Inspector in Charge at Chicago, IL.

2. The investigation to date indicates that approximately 20 ready mix and cement companies in the state of Illinois contributed monies in two separate slush funds of $50,000.00 and $30,000.00, respectively, to influence and bribe various State Senators and Representatives to pass into law House Bill 4176, 1972 Session, which would provide Truck Weight Relief to these companies. House Bill 4176 related to allowing larger cement trucks to carry larger loads to and from construction sites.

3. As of this date, grants of immunity have been issued to MATERIAL SERVICE COMPANY, 300 W. Washington, Chicago, IL, and several employees of Material Service Company. Those immunized consist of several collectors for the fund, several employees of Material Service who authorized participation in the fund, and the intermediary between the legislators and Material Service, JAMES McBRIDE, a Material Service employee. McBride has been interviewed by Postal Inspectors E. W. Greenan, J. A. Charlton, and K. D. Kall on two occasions since August 16, 1973. Mr. McBride is, among his several duties, a lobbyist for Material Service in the state capital, Springfield, IL, and was the original person approached by MR. PETER V. PAPPAS, Legal Counsel for the Secretary of State Office in Springfield. Pappas is the one who allegedly initiated the $50,000.00 fund on behalf of unknown State Legislators and was responsible for setting up a safety deposit box for the first fund of $50,000.00 to be stored until the bill became law. He also is the person in which McBride and two other representatives of the Ready Mix Industry passed on $30,000.00 to in October of 1972.

DEFENDANT'S EXHIBIT NO. 4

LIMITED OFFICIAL USE

This is a privileged document. Distribution to agencies or persons other than U. S. Postal Service Headquarters or Regional personnel must be specifically authorized.

4. On August 28, 1973 Assistant United States Attorneys Samuel Skinner and Howard Stone and Inspector K. D. Kall visited Mr. Pappas at his home at 405 Blodgett, Lake Bluff, IL. Mr. Pappas was advised of his Constitutional Rights, and was informed of the ongoing investigation. He was served with two subpoenas, one a personal subpoena commanding his presence before the Federal Grand Jury at Chicago on September 5, 1973, and the second a subpoena for various partnership records of his law firm, Avgerin, Avgerin, and Pappas, relating to alleged payoffs to legislators regarding the truck weight legislation. Mr. Skinner informed Mr. Pappas that, reflecting upon all evidence in his possession at this time, he would be inclined to recommend to the Grand Jury that federal bribery, mail fraud, and conspiracy charges be made against him. Pappas was advised that both he and his wife were considered to be involved, and that if he would chose to cooperate in the continuing investigation and, if needed, testify in any Grand Jury or trial proceeding, this cooperation would be made known to the judge at time of sentencing. The meeting ended with Mr. Pappas advising he would be in contact with us either way within the next several days.

5. [redacted]

"deletion"

6. Assistant Inspector in Charge G. E. Head, Chicago, IL was advised of the background of this matter, and a request was made upon him to authorize the interception of the telephone call. Inspector Head requested Mr. McBride's address and telephone number which were [redacted] home telephone number [redacted] He stated that he would secure a telephone recorder and advise the Inspector in Charge for proper authorization.

7. Upon arriving at Mr. McBride's residence in Westchester, IL, Inspector Kall and Assistant United States Attorney Stone recognized a car which was similar to the one in Mr. Pappas' driveway the night before. A telephone call was placed to Mr. McBride, and he advised that he had company and would not be able to see us at this time. Surveillance was set up on the residence, and approximately 45 minutes later Mr. Pappas left the residence and departed in a late model white Buick, License Number Illinois MR 3337. Mr. McBride

was then interviewed and revealed that Puppas made no attempts to influence or obstruct him from testifying truthfully. The recorder was not placed on McBride's telephone and no telephone conversations were intercepted.

8. Background information assisting in further identifying Mr. Puppas is unknown at the present time.

9. Further reports will be submitted as this investigation continues.

Karl D. Kell
Postal Inspector

LIMITED OFFICIAL USE

APPENDIX D

DMS TO	DISTRIBUTION	CYS TO
✓	Chief Inspector	✓
	Operations, OMO/PAB	
	Operations, Maint. Div.	
	Finance & Admin., OMC	
	General Counsel, Claims	
	Money Order Division	
	Regional Director	
	Regional Counsel	
	Postal Data Center	
	CI - Central Region	✓
	T Bixby o/c Dow	✓
	File	✓

OCT 24 1973 INITIALS WHM

U.S. POSTAL SERVICE CHIEF INSPECTOR'S DEPARTMENT — REPORT OF POSTAL INSPECTOR

TYPE OF REPORT: ☒ PRELIM ☐ FINAL ☐ SPECIAL ☐ SUPPLEMENTAL

OFFICE: CLASS: REFERENCES: Chicago, Illinois (1st Cl)

DATE: Oct. 18, 1973 CASE NO.: 275-11254-F

SUBJECT: "LIMITED OFFICIAL USE"

MISCELLANEOUS (Bribery)
ALLEGED VIOLATORS: Unknown State Legislators

"ELECTRONIC SURVEILLANCE--REFERRAL TO CHIEF INSPECTOR, ORGANIZED CRIME DIVISION"

POSTAL INSPECTOR: E. W. Greenan

Returned to D. Tapp 11/7/73

POSTAL INSPECTOR IN CHARGE	Chicago, Illinois

1. Personal attention has been given this case on various dates, including October 14, 15, and 16, 1973 at Springfield, Illinois. The investigation concerns an alleged conspiracy to violate the mail fraud statute, ITAR bribery statutes, and possibly income tax statutes, by a group of corporate officials and businessmen who made cash payments to Illinois legislators for favorable consideration to legislation advantageous to the industry involved, ready-mix concrete and material supply companies. The United States Attorney, Northern District of Illinois, considered the mail fraud to be the principal offense and requested the Postal Inspection Service to conduct the investigation.

2. Request was made October 12, 1973 by ARS for authorization to use electronic surveillance equipment:

A. All electronic equipment was furnished by and controlled by Inspector Marcel DeHooge, Internal Revenue Service, who has been detailed to assist the investigation as a technical expert. During the surveillance described herein, it was used only in the authorized investigation. The sealed tapes involved remain in the custody of Mr. DeHooge, who when authorized, will make copies for use in preparation of transcriptions.

B. Copy of ARS request, submitted herewith, details the background data of this investigation, and the reason for the request, inasmuch as to record discussions of a criminal act, pay-offs to legislators; to record discussions of a continuing conspiracy to obstruct justice by planning grand jury testimony which will continue to conceal the criminal act and will obstruct justice. On October 15, 1973 a supplemental request

DEFENDANT'S EXHIBIT NO. 6

was made to include Peter V. Pappas, 405 East Blodgett, Lake Bluff, Illinois as a non-consenting subject of electronic surveillance.

C. The electronic equipment used in this surveillance included three assemblies:

a. [redacted]

b. [redacted] "deletion"

c. [redacted]

D. [redacted] "deletion"

The tapes were sealed immediately after their removal from the equipment described above. Representative Peter Pappas, 2920 32nd Court, Rock Island, Illinois, the consenting individual, is the only party to the conversations presently identified.

E. Conversations were recorded on Monday, October 15, 1973, from approximately 5:05 PM to 5:55 PM.

F. The [redacted] were placed on the consenting individual who went to the Mansion View Motel, 529 South Fourth Street, Springfield, Illinois to meet with other persons in a room not yet identified. The recording through the [redacted] to the [redacted] was made in [redacted] parked and/or being driven in the area of the motel. The Tandberg recorder was receiving in Room 300, Lincoln Tower Motel, 520 South Second Street, Springfield, Illinois (adjacent to the Mansion View Motel). Postal Inspector J. H. Rustad and Inspector Marcel DeHooge attended the vehicle recording, checking mechanical features to determine an apparent successful recording operation. Postal Inspector E. W. Greenan attended the [redacted] in Room 300, Lincoln Towers Motel. The recordings were not monitored by listening to them, nor have they been heard by anyone. Information therein cannot be summarized or evaluated at this time.

3. [redacted] "deletion"

E. W. Greenan

E. W. Greenan
Postal Inspector

APPENDIX E

DISTRIBUTION	CYS TO
Chief Inspector	✓
Operations, OMO/P&B	
Operations, Maint. Div.	
Finance & Admin., OMC	
General Counsel, Claims	
Money Order Division	
Regional Director	
Regional Counsel	
Postal Data Center	
CI - Central Region	✓
1st Ba by o/c Div.	✓
File	✓

DATE: OCT 31 1973 INITIALS: [signature]

U.S. POSTAL SERVICE
CHIEF INSPECTOR'S DEPARTMENT

REPORT OF POSTAL INSPECTOR

TYPE OF REPORT: ☒ PRELIM ☐ FINAL ☐ SPECIAL ☐ SUPPLEMENTAL

OFFICE: CLASS: REFERENCES: Chicago, Illinois (1st Cl)

DATE: Oct. 25, 1973

CASE NO: 275-11254-F

SUBJECT: "LIMITED OFFICIAL USE"

MISCELLANEOUS (Bribery)
ALLEGED VIOLATORS: Unknown State Legislators

"ELECTRONIC SURVEILLANCE--REFERRAL TO CHIEF INSPECTOR, ORGANIZED CRIME DIVISION"

POSTAL INSPECTOR: Karl Kell
E. W. Greenan

POSTAL INSPECTOR IN CHARGE: Chicago, Illinois

1. Reference is invited to preliminary reports dated October 3, 1973 and October 18, 1973 in which uses of electronic surveillance were detailed. At that time no summary or evaluation could be furnished; plea-bargaining with the consenting individual was incomplete and no monitoring or overhearing of the tapes was done. The investigation concerns an alleged conspiracy to violate the mail fraud statute, ITAR bribery statutes, and possibly income tax statutes, by a group of corporate officials and businessmen who made cash payments to Illinois legislators for favorable consideration to legislation advantageous to the industry involved, ready-mix concrete and material supply companies. The United States Attorney, Northern District of Illinois, considered the mail fraud to be the principal offense and requested the Postal Inspection Service to conduct the investigation.

2. Representative PETE PAPPAS (not Peter as referred to in report of October 18, 1973) has now finalized an agreement with James Thompson, United States Attorney, Northern District of Illinois, Chicago, Illinois. The previously sealed tapes are summarized as follows:

A. Recording on September 27, 1973 between 8:10 and 10:00 AM of a conversation between Pete Pappas and PETER V. PAPPAS during a ride between O'Hare Airport and the Conrad Hilton Hotel in downtown Chicago, Illinois. During this conversation, Peter V. Pappas told of being asked to resign from his position in the Office of The Secretary of State. Peter V. Pappas discussed that he needed money for legal fees. He also arranged a luncheon meeting with Pete Pappas and ROBERT CRAIG, an Illinois representative.

DEFENDANT'S EXHIBIT NO. 7

B. Recording on September 27, 1973 between 11:40 AM and 12:25 PM of a conversation between Pete Pappas, Peter V. Pappas and Robert Craig in the Haymarket Lounge of the Conrad Hilton Hotel, Chicago, Illinois. Peter V. Pappas discussed his possible actions; that he could deny receiving the money reportedly paid to him, or he could take the blame for the whole thing. Peter V. Pappas told them that his wife, Mary, had been subpenaed. There was an unrelated discussion of Mrs. Robert Craig's health; then Peter V. Pappas left. Then Robert Craig said he had heard Peter V. Pappas was going to plead guilty and tell about the ready-mix industry fund. Mr. Craig said Peter V. Pappas had denied this to him prior to Pete Pappas joining the two. Robert Craig discussed with Pete Pappas, that he, Pete Pappas, should talk to Walter Hoffelder to tell him they were aware he was going to sign a note for a $25,000 defense fund for Peter V. Pappas, and to assure him the four concerned legislators would come up with $5,000 each.

C. Recording on September 27, 1973 between 5:46 PM to 7:15 PM of a conversation between Pete Pappas and Walter P. Hoffelder in the International Bar Room of the Conrad Hilton in Chicago; Mr. Hoffelder was told the legislators were going to help Peter V. Pappas in his defense fund. Mr. Hoffelder said he would take Peter V. Pappas to "his" bank the next day and arrange for him to get the money he needed.

D. Recording on October 15, 1973 from approximately 5:05 PM to 5:55 PM of a conversation between [redacted] and [redacted] in the area of the Mansion View Hotel, Springfield, Illinois, and subsequent conversation between Course, Pappas, and Peter V. Pappas in a room at the Mansion View Motel, Springfield, Illinois. Initially Course commented that he made a mistake and gave Peter V. Pappas a list of legislators to whom he had given money. There was a discussion of 5, 5, 5, and 5 totalling 20, not 30. Then Peter V. Pappas joined them and they went to Peter V. Pappas' room. There was a general discussion of the ready-mix bill, and Peter V. Pappas said there never was $30,000.

3. The brief summaries above are from a partial playback of copies of the tapes, and interview of Pete Pappas. To expedite their use in debriefing Pete Pappas, the copies of the tapes were returned to the office of the United States Attorney, NDI, Chicago, Illinois for transcribing. A more detailed summary utilizing the tape transcripts will be included in a future report.

4. Background information has been furnished on Peter V. Pappas, Pete Pappas and Robert Craig. Kenneth W. Course resides at [redacted], and is a senator representing the 17th District in the Illinois legislature. Walter P. Hoffelder is a former state senator, and a former chairman of the Motor Vehicle Laws Commission of the Illinois Legislature; he resides at [redacted] No other background information is known.

5. The monitoring and recording of the conversations described above have furnished information considered vital in development of evidence of the alleged violations of the Mail Fraud and Bribery (ITAR) Statutes, and also evidence of possible violations of Subornation of Perjury and Obstruction of Justice Statutes. Authorization was received through the Inspector In Charge, Chicago Division, from the Department Of Justice, Washington, D.C., to record the above conversations. The equipment used in the surveillance was used only in the authorized investigation; the recordings were at the request of the United States Attorney, Northern District of Illinois, Chicago. The surveillances were considered to be in the best interest of law enforcement.

Karl Kall
Karl Kall

E. W. Greenan
E. W. Greenan
Postal Inspectors

"LIMITED OFFICIAL USE"

APPENDIX F

IKJ

CHIEF POSTAL INSPECTOR
Washington, D.C. 20260

April 14, 1975

CRIMINAL DIVISION
APR 16 1975
Received Fraud Section

Mr. John C. Keeney
Acting Assistant Attorney General
Criminal Division
Department of Justice
Washington, D. C. 20530

RECEIVED
APR 16 1975
CRIMINAL DIVISION

Your reference: Electronic Surveillance
United States v. Craig, et al.,
No. 74 CR 877 and 879
JCK:TJM:IKJ:kat
36-23-641

Dear Mr. Keeney:

Your letter dated March 31, 1975, and related attachment, copies attached, requested information concerning possible use of electronic surveillance by the Postal Inspection Service.

A thorough search of our records disclosed no electronic surveillance was conducted on Louis F. Capuzi, 710 N. Rockwell, Chicago, Illinois, Thomas J. Hanahan, 2012 W. Grandview, McHenry, Illinois, Francis Sheahen, 1740 Ravine Terrace, Highland Park, Illinois and John F. Wall, 2874 Hillock Avenue, Chicago, Illinois, or any of the above addresses.

Oral or telephone conversations of the following defendants were monitored and recorded with the prior consent of one of the parties to the conversations during the Inspection Service investigation which led to the indictments:

Kenneth W. Course	3413 Armitage Avenue Chicago, Illinois
Robert Craig	1628 Franklin Danville, Illinois
Frank P. North	2520 Harlem Boulevard Rockville, Illinois
Jack E. Walker	18018 Arcadia Avenue Lansing, Illinois
Peter V. Pappas	405 Blodgett Road Lake Bluff, Illinois

36-23-641
DEPARTMENT OF JUSTICE
RECORD
APR 15 1975
CRIMINAL DIV.

DEFENDANT'S EXHIBIT NO. 9

All of the consensual type monitoring was conducted in accordance with existing Attorney General guidelines covering this type of electronic surveillance. Assistant U. S. Attorneys, Samuel K. Skinner, James F. Holderman and John Gleason, United States Attorney's Office, Chicago, Illinois, are aware of the consensual electronic surveillance conducted by the Inspection Service.

Records relating to the electronic surveillance are in the possession of and available through Postal Inspector James A. Charlton, Chicago, Illinois 60607, who is one of the investigating Inspectors assigned to the case.

Sincerely,

William J. Cotter
Chief Inspector

Attachments

APPENDIX G

Washington, DC 20224

Exb 6

Mr. John C. Keeney
Acting Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Attn: Thomas J. McTiernan
Chief, Fraud Section

Person to Contact:
Mr. Philip Litman
Telephone Number:
184-6732
Refer Reply to:
CP:I:T
Date:
APR 10 1975

CRIMINAL DIVISION
APR 14 1975
Received Fraud Section

Dear Mr. Keeney:

In Re: CAPUZI, Louis F.
COURSE, Kenneth W.
CRAIG, Robert
HANAHAN, Thomas J.
MARKERT, Louis .
NORTH, Frank P.
SHEAHEN, Francis
WALKER, Jack E.
WALL, John F.
PAPPAS, Peter V.

RECEIVED
APR 14 1975
CRIMINAL DIVISION

On March 31, 1975 you requested that the Department of Justice be advised whether the Internal Revenue Service had conducted any electronic surveillance (lawful or unlawful) of the subject-named individual(s) or his (their) premises. You further requested that this reply include any surveillances where one of the parties may have consented to the surveillance.

The electronic surveillance files of the Internal Revenue Service are indexed under the names of individuals who were the subjects of electronic surveillance, attempted electronic surveillance, or on whom leads were obtained as a result of electronic surveillance. Only in those instances where a surveillance was attempted or conducted at premises where the identity of the individuals surveilled could not be ascertained are our files indexed by address or other geographical location.

Our files disclose that none of the individuals named above were the subject of any electronic surveillance conducted by the Intelligence Division. No conversations in which any of the above participated were intercepted, overheard, or recorded through electronic surveillance conducted by the Intelligence Division.

DEFENDANT'S EXHIBIT NO. 8

Mr. John C. Keeney

To our knowledge no state or local authorities have conducted any electronic surveillance on this (these) individual(s), nor was any suggestion made by us to initiate one.

We have also searched our files for any electronic surveillance conducted at the addresses set forth in your request. The results of this search were negative.

The Director, Internal Security Division, Inspection Service, advises that the Inspection Service has conducted no surveillance on the individuals named in your request and they have no indication of any surveillance conducted at the addresses set forth in your inquiry.

If any additional information concerning this matter is required, please contact this office.

Sincerely yours,

John J. Olszewski
Director, Intelligence Division

I.R.S.

APPENDIX H

Address any reply to: P.O. Box 1193, Chicago, Ill. 60690

Department of the Treasury

District Director

Internal Revenue Service

Date: JUN 2 1978

In reply refer to: A:DO

Mr. Peter V. Pappas
33 N. LaSalle Street - Suite 2412
Chicago, Illinois 60602

Dear Mr. Pappas:

This is in response to your May 11, 1978 Freedom of Information Act request. In that letter you ask for copies of various documents prepared by Internal Revenue Service Inspector Marcel D'Hooge.

A search of the Chicago District revealed no such records within our control. However, since the documents requested would, if they exist, be controlled by the Office of the Regional Inspector, a copy of your request has been forwarded for their response.

I hope you find this action to be of assistance to you. If you have any questions regarding this matter, you may contact Mr. Vince Killen at 886-4804.

Sincerely,

for Charles F. Miriani
District Director

DEFENDANT'S EXHIBIT NO. 10

APPENDIX I

Internal Revenue Service — Department of the Treasury

Assistant Commissioner (Inspection) — Washington, DC 20224

Mr. Peter V. Pappas
Suite 2412
33 North LaSalle Street
Chicago, IL 60602

JUL - 5 1978

Dear Mr. Pappas:

This is in response to your request for information under the Freedom of Information Act.

Inspection records show that the Internal Revenue Service did not conduct an independent investigation of you in 1973 as you suggest in your letter. We did, however, provide electronic surveillance equipment and technical assistance to the U.S. Postal Service. The resulting original tapes, copies and transcriptions, together with logs of the events were sealed and placed in an evidence locker at the suggestion of the U.S. Attorney.

Subsequently on February 2, 1976, these documents were turned over to Postal Inspector J. A. Charlton.

The Internal Revenue Service does not have in its custody any of the documents you request.

Very truly yours,

DEFENDANT'S EXHIBIT NO. 11

R L Rebein
for W. A. Bates

APPENDIX J

Re Brick
Grand Jury 73-1495
Karl Kell.

1, 3" tape removed from tape recorder
IRS BA # 10932 carried by Pete Pappas
during meeting at Conrad Hilton Hotel
approx 11:40 to 12:25 9/27/73 removed
from recorder & placed into evidence by
Dr E [illegible] Confirmed prior to sealing per spec
instr. H. Stone.

Date released	Released by	Released to	Purpose
10/2/73	Silent (not monitored) copy prepared for instant H. Stone — held for presentation to Pappas then Stone to		
10/17/73	Copy made for AUSA Stone in evidence room (as above) orig returned to Safe — by McE [illegible]		
10/21/74.	Copy of tape prepared for possible presentation to defense per AUSA Stone By McE [illegible] orig return to		
12/11/74	Copy made for possible processing per instr. AUSA Stone by McE [illegible] — orig returned to safe		
DEC 18 1974	J.A. Charlton Postal Inspector	Merle Berlin	Prosecution By A.U.

Copy of page released to Postal Inspector
Karl D. Kell - 2/2/76.
MB

DEFENDANT'S EXHIBIT NO. 18

APPENDIX K

Mc Bride
GJ 73-1495
Insp K. KELL.

1 5" reel tape made on Nagra # 64-5673 through receiver of IRS car 585 of conversation of Pete Pappas and others at the area of the Mansion View Motel 10/15/73 from about 505 PM to 555 PM at Springfield Ill. Tape removed from recorder 10/15/73 by M. E. George - maintained secure & turned into evidence locker 10/17/73

Date released	Released to	Released by	Purpose
[illegible] 1 [illegible] 1974	J.A. Charlton Postal Inspector	Merle [illegible] Berlin	Prosecution by P.O.

Copy of page released to Postal Inspector Karl D. Kell - 2/2/76.
MB

DEFENDANT'S EXHIBIT NO. 19

see Ex 6

APPENDIX L

Mc Bride
GJ # 73-1495
Insp KARL KELL.

1, 5" Reel Tape made by Insp. Edw. Greenan U.S. P.O, at Lincoln Towers Springfield Ill 10/15/73 on Tandberg recorder # 2300719 during approximate period 5:05 PM to 555 PM - containing conversation between PETE Pappas & others. Tape received by M. E. George 10/15/73 and secured - turned into evidence locker 10/17/73

Released	Released to	Released by	Purpose
[illegible] 18 1974	J.A. Charlton Postal Inspector	Merle [illegible] Berlin	Prosecution by P.O.

Copy of page released to Postal Inspector Karl D. Kell - 2/2/76.
MB

DEFENDANT'S EXHIBIT NO. 20

See Ex 6

APPENDIX M

Re Bride
GJ-73-1495
KARL KELL.

1, 3" tape removed from Nagra recorder #9572 worn by PETE PAPPAS in the area of the Mansion View Motel Springfield Ill from 5:05 PM to 555 PM 10/15/73. Remved fom recorder by M. D'Hooge maintained secure and turned in as evidens 10/17/73. Copy prepared prior to sealing in evidence.

ti Released	Released by	Released to	Purpose
0/19/73	Copy of tape prepared for evidence room by M E D'Hooge	returned to safe	Prepared in
0/23/74	Copy prepared for defense per instruction AUSA		
	H. Stone - by M E D'Hooge returned to safe-		
2/12/74	Copy prepared for processing per	Matt. H. Stone AUSA	
	by M E D'Hooge - returned to Safe		
1/20/74	Merle A Berlin Karl E Hooge	M. D'Hooge	Processing & Prosecution by P.O.

Copy of Page released to Postal Inspector Karl D. Kell - 2/2/76.
MB

DEFENDANT'S EXHIBIT NO. 21

APPENDIX N

Re Bride
GJ-73-1495
Orig K. Kell.

1 5" tape made on UHER Recorder #142326080 at Mansion View Motel Springfield Ill during period 8:00 to 8:45 AM on 10/23/73 and containing test of PETE PAPPAS with other persons in his room. Removed from tape recorder by M D'Hooge on 10/23/73 and secured and turned into evidens 10/24/74.

Released 8 1974	Released to	Released by	Purpose.
	J.F. Clarkson Postal Inspector	Merle A Berlin	Prosecution by P.O.

Copy of Page released to Postal Inspector Karl D. Kell - 2/2/76.
MB

DEFENDANT'S EXHIBIT NO 22

APPENDIX O

Mc Bride (Postal)
Karl Kell
GJ 73-1495.

1. 5" reel recording tape containing text of conversation between Pete Pappas and Bob Craig at Mansion View Motel Springfield Ill approx 8:00 to 8:45 P.M. 10/23/73. Made on Nagra III Ser # 64-5673 @ 1 7/8"/sec. thru broadcast from Bell & Howell transmitter. Received in evidence by M. E D'Hooge 10/24/73

Released	Released to	Released by	Purpose
[illegible] 8 1974	J.A. Charlton Postal Inspector	Merle B Berlin	Prosecution by P.O.

Copy of page released to Postal Inspector Karl D. Kell - 2/2/76. MB

DEFENDANT'S EXHIBIT NO. 23

APPENDIX P

McBride,
GJ 73-1495
Karl Kell.

1 3" reel recording tape made on Nagra SN Recorder # 9572 in possession of Pete Pappas during conversation between Pete Pappas and Bob Craig approximately 7:45 to 8:45 10/23/73 at the Mansion View Motel, Springfield Ill. Tape removed by M. E D'Hooge - returned to Evidence locker & secured as evidence 10/24/73 Copy prepared for AUSA prior to sealing.

Date released	Released to	Released by	Purpose
10/25/73 [illegible]	M E D'Hooge	Self.	Copied & returned per AUSA. One provided use by defense.
2/11/74	Copy prepared by M E D'Hooge in possible use by Marc Weiss (processing) to safe upon completion		Evidence room for original returned
2/20/74	M. D'Hooge [illegible] E D'Hooge	Merle B Berlin	Processing & Prosecution by P.O.

Copy of page released to Postal Inspector Karl D. Kell - 2/2/76. MB

DEFENDANT'S EXHIBIT NO. 24

APPENDIX Q

McBRIDE
GJ 73-1495
KARL KELL.

1, Reel tape made 10:45 to 10:57 at area of State Capitol Bldg. Springfield Ill 11/14/73 Made on Uher Recorder #143328576 @ 1 7/8 by M. E. DeForge with E. Greenan in IRS center 557. Recording made of Pete Pappas & other persons Turned in as evidence 11/15/73

released	Released to	Released by	Purpose
1 16 '74	Joe Gaelken Postal Inspector	Merle B. Berlin	Prosecution by P.O.

Copy of page released to Postal Inspector Karl B. Kell - 2/2/76.
MBB

DEFENDANT'S EXHIBIT
NO. 25

APPENDIX R

Mc BRIDE
GJ 73-1495
KARL KELL

1 3" tape removed from tape recorder (Nagra # 9572) worn by Pete Pappas in the area of the State Capitol, Springfield, Ill during period 10:45 to 10:57 11/14/73. Removed from recorder by M E DeForge 11/14/73 & sealed - turned into evidence locker 11/15/73
Copied for AUSA Prior to sealing M E DeForge.

released	Released to	Released by	Purpose
5/74.	Copied by M E DeForge at the Evidence room by M E DeForge at the instruction of AUSA H. Stone to prepare copy for possible presentation to defense. & returned to safe.		
2/74	Copied by M E DeForge for AUSA H. Stone to have copy for processing by Prof. M. Weiss returned to safe after processing		
20/74	Marcel DeForge	Merle B. Berlin	Processing and Prosecution by P.O.

Copy of page released to Postal Inspector Karl B. Kell - 2/2/76.
MBB

DEFENDANT'S EXHIBIT
NO. 26

No. 79-216

In the Supreme Court of the United States

OCTOBER TERM, 1979

PETER V. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. McMURRAY
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Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 602 F.2d 131.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1979. The petition for a writ of certiorari was filed on August 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to grant petitioners a new trial based on the claim that the government violated due process by failing to disclose certain documents to them.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on one count of conspiracy to commit mail fraud, 11 counts of mail fraud, and two counts of interstate travel with intent to promote bribery, in violation of 18 U.S.C. 371, 1341 and 1952. Petitioner Craig was sentenced to three years' imprisonment and a fine of $5,000. Petitioner Pappas was sentenced to five years' imprisonment and a fine of $10,000. The court of appeals affirmed (*United States* v. *Craig*, 573 F. 2d 455 (7th Cir. 1977)), and this Court denied certiorari, 439 U.S. 820 (1978). Thereafter, petitioners filed a motion for a new trial pursuant to Fed. R. Crim. P. 33, alleging that they had discovered certain new evidence. The district court denied that motion without opinion (Pet. App. B). The court of appeals affirmed (Pet. App. A).

The pertinent facts are summarized in the opinions of the court of appeals on direct appeal (573 F. 2d at 463-473) and on appeal from the denial of petitioners' motion for a new trial (Pet. App. 1-6). Briefly, the evidence showed that petitioners engaged in a scheme to bribe members of the Illinois General Assembly in order to obtain the passage of certain legislation. Petitioner Craig was one of the bribed legislators. Petitioner Pappas was a liaison employee in the office of the Illinois Secretary of State. The participants in the scheme planned to create a $50,000 bribery fund—$40,000 of which would be paid to the legislators and $10,000 to petitioner Pappas. However,

only about $30,000 was actually collected, of which petitioner Pappas received several thousand dollars before distributing the rest to the legislators.

The government's evidence at trial included the testimony of an informer, Pete Pappas (no relation to petitioner Peter V. Pappas),[1] and three intercepted conversations between informer Pappas and petitioners during which they discussed the bribery scheme. These recordings, made with the informer's consent, were authenticated by a government expert, Professor Marc Weis, who found no evidence of alteration. Weis also authenticated certain copies of the tapes that were made to improve audibility.[2] Informer Pappas testified that both the original tapes and the copies truly and accurately reflected his conversations with petitioners.

ARGUMENT

Pursuant to a post-trial request under the Freedom of Information Act, petitioners obtained certain log sheets used to record custody of the tapes introduced into evidence at trial. They also obtained three reports of postal inspectors describing their investigation of the case, as well as several items of correspondence. Petitioners contend (Pet. 10-19, 21-23, 27-29) that these documents should have been disclosed before trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that their discovery of this evidence entitles them to a new trial.

---

[1]Pete Pappas was also a legislator. He cooperated in the investigation and pleaded guilty to reduced charges.

[2]The original tapes at trial were marked 101-0, 102-0, 103-0, and 104-0, and were described as the "Zero" series recordings. Tape 104-0 did not concern petitioners and was not used at trial. The copies made by the government's expert were marked 101-1 through 104-1.

We note at the outset that there is no claim here of knowing use of perjured testimony or of suppression of exculpatory evidence of a kind specifically requested by the defense at or prior to trial. Rather, as in *United States* v. *Agurs*, 427 U.S. 97 (1976), this is a case in which the government possessed information that the defense claims after trial should have been disclosed as exculpatory. As *Agurs* establishes, such claims are to be evaluated by the trial court on the basis of whether the evidence in question, considered in conjunction with all the facts and circumstances of the trial, creates a reasonable doubt regarding the defendants' guilt that would not otherwise exist (417 U.S. at 112). As both courts below correctly concluded, petitioners have wholly failed to demonstrate that this "newly discovered evidence" casts any doubt upon the validity of their convictions.

1. Petitioners first contend (Pet. 12-15) that the IRS log sheets obtained through their FOIA request (Pet. App. 23-31) show that the government's expert, who testified that the original tapes had not been altered, received only copies of the tapes and not the originals.

As the court of appeals correctly noted (Pet. App. 5), this contention was never raised in the district court and should not be raised for the first time on appeal. See, *e.g.*, *United States* v. *Knuckles*, 581 F. 2d 305, 310 (2d Cir. 1978). In any event, the claim is without merit. The tapes that were introduced into evidence were examined by the government's expert in March 1976 for purposes of authentication (Tr. 1986-1987). While copies of the tapes had previously been made in 1974, the originals were given to the expert for examination 15 months later (Tr. 2026-2027; see also Tr. 2060). The notation in the logs that copies were made in 1974 does not suggest that the expert did not receive the original tapes in 1976.

Moreover, as the court of appeals held on direct appeal, the authenticity of the tapes was amply established by one of the participants in the conversations (Pete Pappas), who testified that the tapes were true and accurate recordings of the conversations in question (573 F. 2d at 478-479). Under these circumstances, the logs do not cast any doubt, reasonable or otherwise, upon petitioners' guilt.[3]

2. Petitioners also argue (Pet. 15-17) that a postal inspector's report dated October 25, 1973 (Pet. App. 14) shows that one of the tapes used at trial (Gov. Ex. 101-0) is inaccurate. The tape in question is a recording of a conversation between Pete Pappas and petitioners on September 27, 1973. Petitioners argue that the report refers to subjects of discussion that were not recorded on the tape in question, suggesting that the tape has been altered.

However, as the court of appeals pointed out (Pet. App. 3), the report of the postal inspector purports to reflect a "partial playback of copies of the tapes, and interview of Pete Pappas." During his interview with the postal inspectors after the original conversation, Pappas supplied additional information about those portions of the conversation that were "unintelligible" on the tapes. Under these circumstances, the court of appeals correctly concluded that the report did not suggest any alteration of the tape (*ibid.*):

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[3]Petitioners' argument (Pet. 20) that the logs are Jencks Act statements is insubstantial. Although the logs were prepared under the supervision of an Assistant United States Attorney who testified at trial, the clerical entries in the logs were made by various other persons. None of the entries constitute witness statements under the Jencks Act. See 18 U.S.C. 3500(e).

> When he was interviewed by the postal inspectors within a month of [the] conversation, [Pappas] was obviously able to supply the unintelligible portions, which accounts for the postal report containing some information not heard on the recording admitted in evidence.

Moreover, since the additional material contained in the postal report is inculpatory, not exculpatory, such material could not create a reasonable doubt as to petitioners' guilt. *Ibid.*

3. Petitioners also contend that a postal inspectors' report dated October 18, 1973, reveals that two of the intercepted conversations used at trial were recorded not only by a device on the informer's body, but also by a receiver operated by federal agents. They argue that the "backup" tapes obtained through use of the receiver were not disclosed and might have been used by them at trial to impeach the integrity of the original tapes (Pet. 13, 23-25).

However, the government produced an affidavit prior to trial describing the electronic surveillance used in the investigation (Pet. App. 4). Attached to that affidavit was a letter stating that petitioners' conversations were both "monitored and recorded." During the cross-examination of informer Pappas at a pre-trial suppression hearing (Tr. 384-386), defense counsel also confirmed the possibility that the conversations in question were monitored by a federal agent in an adjoining hotel room. In addition, all of the original tape recordings in the government's possession, including recordings that were not going to be used at trial, were made available to the defense for inspection prior to trial. Tr. 1996-1998; see also the government's "Statement of Continuing Availability of Tape Recorded Conversations," filed in the district court.

Accordingly, the existence of these tapes does not constitute newly discovered evidence withheld by the prosecution at trial.

Moreover, petitioners have made no showing that the "backup" tapes differ from the originals; nor have they suggested any ground for concluding that the duplicate tapes could create a "reasonable doubt" as to their guilt. See *United States* v. *McCrane*, 575 F. 2d 58, 61 (3d Cir. 1978). Because the tapes were made available to petitioners before trial and were not exculpatory, the courts below properly declined to grant petitioners a new trial on this basis. See *United States* v. *Ruggier*, 472 F. 2d 599, 604-605 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Riley*, 530 F. 2d 767, 771 (8th Cir. 1976).[4]

4. Petitioners also argue that a postal inspector's report dated August 31, 1973 (Pet. App. 8) reveals that the inspector and an Assistant United States Attorney interviewed James McBride, who died before commencement of the trial. According to the postal inspector's report, McBride stated that petitioner Pappas made no attempt to influence him or prevent him from testifying (Pet. App. 9-10). Petitioners argue that this statement would have been helpful in rebutting the assertion at trial that Pappas had attempted to influence certain witnesses (Pet. 18-19).

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[4] *United States* v. *Poole*, 379 F. 2d 645 (7th Cir. 1967), relied on by petitioners, is not relevant here. In contrast to the situation in *Poole*, the government did nothing to mislead petitioners or prevent them from inspecting the duplicate "backup" tapes.

The postal inspector's report, however, was not material to the issues presented at trial. Petitioners were not indicted for attempting to influence witnesses. Moreover, as noted by the court of appeals, the "fact that Peter V. Pappas did not try to influence McBride on August 28 is a negative fact and has no bearing on other evidence that he attempted to influence other people at other times" (Pet. App. 5). Finally, the statement of McBride was inadmissible hearsay and could not have been used by petitioners in their defense at trial.

Nor was the Jencks Act violated by the government's failure to produce the postal inspector's report. The Jencks Act only requires the production of prior statements of witnesses. See 18 U.S.C. 3500. McBride, whose statement was summarized in the report, was not a witness at trial. And while it is true that the Assistant United States Attorney who participated in the McBride interview was a witness at trial, the report in question contains no statement made by him.[5]

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[5]Petitioners also argue that a new trial is required because the agents involved in the investigation failed to comply with the Attorney General's guidelines governing consensual interception of conversations (Pet. 31). In accepting the government's contention that emergency conditions required interception without prior approval by the Attorney General, the court of appeals found substantial compliance with the guidelines "in all respects" (Pet. App. 6). Furthermore, *United States* v. *Caceres*, No. 76-1309 (Apr. 2, 1979), establishes that failure to comply with internal guidelines will not invalidate an interception of conversations if the interception is consistent with applicable statutory and constitutional provisions. As noted in *Caceres*, neither the Fourth Amendment nor 18 U.S.C. 2510 *et seq.* (the federal wiretap statute) forbids interception of conversations where one party to the conversations gives his consent. Slip op. 8-9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. MCMURRAY
Attorney

OCTOBER 1979

No. 79-216

In the Supreme Court of the United States

OCTOBER TERM, 1978

PETER V. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS IN OPPOSITION TO BRIEF FOR THE UNITED STATES

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AUTHORITIES CITED

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONERS IN OPPOSITION TO BRIEF FOR THE UNITED STATES

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners Peter V. Pappas and Robert Craig, Defendants-Appellants in the Court below, submit this Reply Brief in response to the Brief of the United States in Op-

position to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The Opinion below is set forth verbatim in the Petition. (App. 1-6.)

It is reported at 602 F. 2d 131 (7th Cir. 1979).

JURISDICTION.

The decision below was filed on July 11th, 1979.

The Petition here was filed August 9th, 1979.

The Government's brief in opposition was due on October 15th, 1979, but was filed thereafter.

This Reply is filed *instanter*.

The jurisdiction of this Supreme Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Petition 79-216 presented Eight Questions for Review (Pet. 2-4), but the Government Brief recasts them into one brief, restrictive "Question".

Petitioners reiterate the same Eight Questions for Review by the Court.

STATEMENT.

Petitioners detailed the pertinent facts in their Statement. (Pet. 5-9). The Government Brief neither refutes nor objects to the Petitioners' Statement. Instead, the Government Brief submits its own "Statement"—a version that does not address itself to the Questions here, and a version that includes extraneous tangential matters. In commenting about the $30,000 fund (Gov. Br. 3), the Government volunteers unnecessarily and erroneously that ". . . Petitioner Pappas received several thousand dollars before distributing the *rest* to the legislators." (Emphasis added). The Indictment here (74 Cr 879) charged that those funds were received by legislators. It did *not* charge that Petitioner Pappas retained any portion of that fund. No indictment charged income tax evasions. This extraneous statement does not bear upon the Questions for Review and thus are inappropriate.

PETITIONERS' ARGUMENT IN REPLY.

The Petition detailed Eleven separate Reasons supporting a grant of this Petition for a Writ of Certiorari. (Pet. 10-37). The Government chose not to respond to each Reason—and instead prefaced with a general statement, four "arguments". (Gov. Br. 3-8). Petitioners reply as follows:

Reply to Government's Prefatory Statement:

A. First, the Government urges that ". . . there is no claim here of knowing use of perjured testimony . . ." (Gov. Br. 4, para. 1). At this time, that is correct. However, it is also immaterial.

Noting that the Government does not deny the omissions by its witnesses cited in the Petition, an omission of pertinent facts, a lie of omission is as prejudicial as a perjured statement, whether there is perjury or not.

Assistant United States Attorney Stone, a Government Witness and prosecutor, testified in detail about interviewing Informant Pete Pappas. This occurred in September, 1973, and his 1976 testimony supported the claim of "prior consent" to tape. But the direct examination, and the responses to cross-examination studiously omitted pertinent facts in Stone's personal possession. Stone failed to detail

his secret interviews with McBride—a key witness with the McBride "hearsay". (Pet. 19). Stone failed to reveal the existence of the IRS LOCKER and of the LOGS thereof and the existence of the tapes in that locker and of the "backup" tapes. Stone failed to reveal that he had ordered that "copies" of tapes in the locker be prepared for release to Professor Weiss. (Pet. 28).

There is now no explanation by the Government why these omissions occurred. It obviously was prejudicial—and an unnecessary omission—in derogation of due process.

B. The Government, conceding that evidence was suppressed and omitted, now argues that the Government did not suppress "exculpatory" evidence. (Gov. Br. 4, Para. 1).

First, this ignores that there is evidence still being suppressed and it's nature—whether exculpatory or inculpatory—is unknown. Secondly, whether evidence is or is not exculpatory is a jury's prerogative.

Petitioners are not restricted to exculpatory evidence in any event. Rule 16 Motions were duly made. In response, the Government produced some tape recordings, thus admitting recognition that Rule 16 demands required production of the tapings. Knowingly, the government suppressed other tapes and other documents. Now the Government unconscionably argues that the Petitioners did not claim either knowing use of perjury or suppression of "exculpatory" evidence.

The "knowing" suppression of evidence (in *knowing* violation of a Court Order of production of evidence) was the very tool used to frustrate the defense demands and to frustrate making that claim now, of knowing use of perjury and of knowing use of exculpatory evidence.

The tapes were the cornerstone of the Government's Case and the Government chose to suppress some of them

along with various documents. Whether this evidence is or is not exculpatory evades the full brunt of the Petitioners' position. Petitioners have stressed that the suppressed evidence so tainted the "ZERO" tapes, that a new trial is mandated. The tapes presented, were the sole and independent third-party evidence of the conversations, since the Informant did not corroborate them. Without the tapes, the case would have fared differently.

Reply to Government Argument No. 1: (Gov. Br. 4-5).

The Government responds to the Petitioners' contention that Professor Weiss examined only "copies" of tapes rather than originals. Professor Weiss had testified that if he had examined only copies, that his tests were a nullity. (Pet. 12-15, Exhibits 23-31)

The Government argues that since Informant Pete Pappas testified that the "ZERO" tapes were accurate, that this rebuts any fault in the Weiss tests. (Gov. Br. 5). This ignores that the Informant never listened to the original 1973 tapes, and that in 1976, he listened to "copies" of the "ZERO" tapes.

The Government also now ignores that the Informant was unaware of the *other* nine tapes in the IRS evidence locker, and that the Informant was also unaware that Stone had ordered that copies of the tapes in the locker be made for release to Professor Weiss.

As to the Informant's recollection in 1976, of his 1973 conversations, it should be noted that the Informant did not testify in 1976, as to the words missing from Tape 101-0, nor even detect their absence. On one hand, the Government urges that in 1973, the Informant advised in detail, the contents of that tape—but then in 1976, his failure to so testify is to be ignored. His 1976 recollection

is not material as to whether Weiss examined copies or originals, and is faulted by his non-recollection.

In addition, the Government relies upon the Seventh Circuit Opinion in 1977, when affirming the original conviction, at 573 F. 2d 478-9. The Government urges that the said affirmance establishes the integrity and authenticity of the tapes. This ignores that the suppressed evidence was still suppressed and never considered by the Seventh Circuit. Hence, its opinion is not the "law of the case" on this point. It is viable Question and issue, and now before this Court.

Finally, the Government concedes that Stone ordered that copies of tapes be made for delivery to Professor Weiss. It also concedes that the new documents revealed this now for the first time. Now the Government suggests that this new evidence alone does not establish that Weiss received only copies and did not receive the original tapes. (Gov. Br. 4.) It should be noted that Weiss himself did not know whether the tapes were copies or originals. The new evidence is the only evidence—it establishes that copies were made for the specific purpose of delivering them to Weiss. This evidence is more probative than mere conjecture.

Reply to Government Argument No. 2: (Gov. Br. 4-5)

This relates to the "missing words". Kell-Greenan's 1973 Report detailed words they heard on a copy of the tape of the September 27th, 1973 conversation that are not on Tape 101-0 of the same conversation—the government's court exhibit. (Pet. 15-17, Pet. Exh. 14).

The Government concedes that Kell-Greenan prepared and filed that Report after listening to the tape, but argues that their overhearing was supplemented by information

from Informant Pete Pappas as to portions of the tape that were "*unintelligible*". This is a non-explanation.

Kell-Greenan reported "intelligible" words—reporting what *they* heard. The Informant never heard *that* Kell-Greenan tape in 1973, nor even the original tape. It is inconceivable that the Informant's input as to any "unintelligible" portions of that tape affects "intelligible" portions.

The copy of the Kell-Greenan tape is still missing, as is its transcript. Only their written Report remains—a report by experienced investigators reporting intelligible and audible words.

Those words are still missing from Tape 101-0--without explanation.

Tape 101-0 is obviously conclusively faulted. The omissions of evidence, and the continued suppression of evidence supports the Petitioners. Only reversal will reach the truth and assure the fair trial and the due process due the defendants.

Reply to Government Argument No. 3. (Gov. Br. 6-7)

This relates to the "backup" tapes made secretly and simultaneously with those made with the recorders in the possession of the Informant. (Pet. 23-31, Exhibits 18-26).

First, the Government urges that a pretrial document advising that 1973 conversations had been "monitored and recorded", was a clue of the simultaneous use of the radio transmitter and of recordings of the transmissions.

The Government ignores that the prosecutors themselves supplemented that report—with ostensibly all of the evidence of what had been so "monitored and recorded". The

Government produced *only* the "ZERO" Tapes. They omitted any reference to and failed to produce the "backup" tapes. The Government has conceded their suppression. Thus, that pretrial clue was but a tip of an iceberg—one that never surfaced.

Secondly, it should be noted that now, the Government declined to resubmit its arguments below. Below, the Government urged that since it had never *denied* using the radio transmitters, that the lack of such a denial was a revelation that in fact that the transmitters had been used. Obviously that was a nonsequitur. It still is. (Pet. 25).

Lastly, the Government argues that the Petitioners have ". . . made no showing that the 'backup' tapes differ from the originals . . .". That is true, and the government suppression made that true. The defense never had the "backup" tapes—the "original" tapes were never produced. The Government did not even attempt to prove a chain of custody linking the original 1973 tapes to the 1976 "ZERO" tapes. (Pet. 21-23).

Below, the Government opposed an evidentiary hearing, and even failed to voluntarily release the "backup" tapes for an *in camera* inspection by court. If that had occurred —then a comparison could have been made. It should be provided for now.

Reply to Government Argument No. 4: (Gov. Br. 7-8)

This relates to the McBride "hearsay" Reason for granting the Writ. (Pet. 18, 19, 20, 26). McBride's "hearsay" was the linchpin of the Government's case. (Pet. 8-9). The suppressed evidence revealed the one secret interview of McBride, plus two other still undisclosed interviews—all in August, 1973. One of the interviewers was Assistant United States Attorney Stone, a trial witness for the Government.

The Government, in limiting its argument to the "obstruction of justice" issue, ignores that the suppression of that one document and of the other still suppressed documents completely frustrated the defense rights to full cross-examination and of confrontation of the witnesses who quoted McBride's "hearsay" liberally, with impunity.

Petitioners point out that the denial of their rights of confrontation is a due process denial. (Pet. 26-7). The defendants need not now prove want of prejudice. Rather, the Government must prove strictly, that the denial below was "harmless". The Government abandoned that argument before the Seventh Circuit. It is still before this Court, (Pet. 26-7), and a valid reason for the grant of the Writ.

Reply to Government's Footnote re: "Caceres": (Gov. fn 5, page 8)

Petitioners' Reason No. 10 argued that the Exclusionary Rule should not be applied here. (Pet. 31-34). The Government limited its Answer to the cited footnote.

However, the footnote is not responsive to the arguments posed by the Petition. Petitioners reiterate their Reason No. 10, that *Caceres* should be limited to it's factual situation involving an IRS investigator taping an ongoing crime —a bribe attempt. It should not be extended here, where a United States Attorney is directing the taping of past crimes or events. The non-compliance by a federal attorney is hardly akin to that of an IRS auditor coming under this Court's Lopez holding.[1] The United States Attorney's non-compliance is not shielded by the "Lopez" umbrella, since the Informant did not corroborate the tapes.

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[1] *Lopez* v. *U.S.*, 373 U.S. 427 (1966); *U.S.* v. *Caceres*, ---- U.S. ----, 59 L.Ed.2d 733 (1979).

CONCLUSION

Petitioners submit that a Writ of Certiorari should be issued.

Respectfully submitted,

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NICHOLAS C. AVGERIN, *of Counsel.*

ANNA R. LAVIN
EDWARD J. CALIHAN
for Robert Craig.